(1) Supreme Court, U.S.
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00-365 JUL 10 2000

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NO. _____

SUPREME COURT OF THE UNITED STATES

CHARLOTTE D. AHEART,

Petitioner,

-against-

SODEXHO MARRIOTT SERVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals issued a decision contravening the precepts set forth in *Faragher v. Boca Raton, 524 U.S. 775 (1998),* and *Burlington Industries v. Ellerth, 524 U.S. 742 (1998).*

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Record Below Unambiguously Establishes That The Petitioner Reported Incidents Of Her Supervisor's Sexual Harassment To Management Personnel On Many Occasions Between October 1994 and June 1996 2

B. The Proceedings Beow 6

REASONS FOR GRANTING THE WRIT 9

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON VICARIOUS LIABILITY FOR HOSTILE ENVIRONMENT HARASSMENT 9

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER UNITED STATES COURTS OF APPEALS 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Cited: **Page**

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) ..... *passim*

Chambers v. Trettco, Inc.,
591 N.W.2d 413 (Mich. App. 1998) 18

Charlotte D. Aheart v. Sodexo Marriott Services, Inc.,
Civ. No. 99-1033 (4th Cir. Feb. 22, 2000) 1-2

Curry v. District of Columbia,
195 F.3d 654 (D.C. Cir. 1999) 12

Faragher v. Boca Raton,
524 U.S. 775 (1998) ..... *passim*

Glickstein v. Neshaminy School Dist., et al.,
Civ. No. 96-6236, 1999 WESTLAW 58578
(E.D. Pa. Jan. 26, 1999) 18

Kimbrough v. Loma Linda Development, Inc.,
183 F.3d 782 (8th Cir. 1999) 18

Ogden v. Wax Works, Inc.,
Civ. No. 991643, 2000 U.S. App. LEXIS
12204 (8th Cir. June 6, 2000) 14, 16-18

Sims v. Health Mid-West Physicians Serv.,
196 F.3d 915 (8th Cir. 1999) 18

Williams v. General Motors Corp.,
187 F.3d 553 (6th Cir. 1999) 18

TABLE OF AUTHORITIES

Cases Cited: **Page**

Williamson v. City of Houston, Tx,
148 F.3d 462 (5th Cir. 1998) 10, 16

Statutes:

28 U.S.C. § 1254(1). 2

42 U.S.C. § 2000(e) *et seq.* 2

APPENDIX

Appendix A: Opinion of the United States Court of Appeals for the Fourth Circuit Issued February 22, 2000 ..... 1a

Appendix B: Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing Issued April 11, 2000 ..... 3a

Appendix C: Order of the United States District Court for the District of Maryland Issued September 10,1998 ..... 4a

Appendix D: Exhibits to Plaintiff's Opposition to Summary Judgment 5a

NO. _____

Supreme Court of the United States

CHARLOTTE D. AHEART,
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-against-

SODEXHO MARRIOTT SERVICES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charlotte D. Aheart respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Fourth *Circuit in Charlotte D. Aheart v. Sodexho Marriot Services, Inc,* Civ. No. 99-1033 (4th Cir. Feb 22, 2000), can be found at App. A. The Order of the United States District Court for the District of Maryland granting the defendant's Summary Judgment Motion can be located at App.C.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit was entered on February 22, 2000. See App. A, at 1a. The Fourth Circuit denied a timely petition for rehearing on April 11, 2000. *See* App. B, at 3a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

STATEMENT OF THE CASE

A. The Record Below Unambiguously Establishes that the Petitioner Reported Incidents of Her Supervisor's Sexual Harassment To Management Personnel On Many Occasions Between October 1994 and June 1996

Leo Thompson, a male employee, joined the defendant's security department as a security officer and one of the plaintiff's co-workers in May 1994. *See* Thompson Dep., at 24, App. D, at 65a. A few months thereafter, Thompson commenced sexually harassing the petitioner, a security officer, over a period of two years. *See* Aheart Dep., at 206-67, App. D, at 10-63a. Thompson's harassment consisted of incessant lewd actions, including, but not limited, to frequent, vulgar requests to "fuck" her, for "head" (i.e., oral sex), and/or for "some pussy." *See*

Aheart Dep., at 255-66, App. D, at 52-62a. Thompson also frequently endeavored to reach up petitioner's skirt, to grab her and try to kiss her. *See* Aheart Dep., at 264-65, App. D, at 60-61a. Notwithstanding management's knowledge of Thompsons actions toward Aheart, the defendant promoted him in April 1995, making Thompson one of her immediate supervisors. *See* Gamble's April 5, 1995 Memorandum, App. D, at 78a.

When confronted with sexual harassment, Marriott employees are directed to report the matter in accordance with company policy. The company policy provides, in relevant part:

> Complaints of sexual and other forms of harassment at work will be promptly and carefully investigated.
>
> . . . If you have concerns about harassment at work by *anyone*, including managers, supervisors, co-workers, guests, clients, customers or visitors, you should immediately bring those concerns to your manager's attention or you may contact ANY manager or supervisor with whom you feel comfortable discussing the situation.

See Associate Agreement for Marriott's Non-Harassment Policy and Marriott's Policy Against Sexual Harassment, at 2, App. D, at 7a. (Emphasis added.)

In the instant case, the evidence establishes that the petitioner informed a number of management personnel of the travails she was suffering at the hands of Thompson. For instance, in *October 1994* the petitioner advised Donald Galloway, a security department supervisor, that Thompson had touched the

sexually private parts of her body on the job without her consent and otherwise sexually harassed her. *See* Aheart Dep., at 208, App. D, at 11a; Galloway Dep., at 64-65, App. D, at 69-70a. Soon after receiving the petitioner's complaint, Galloway informed John Gamble, the respondent's then security director, of her sexual harassment allegations. *See* Galloway Dep., at 66-68, App. D, at 71-74a. Yet, despite learning of her complaint, and the express dictates of the respondent's Non-Harassment Policy, neither Galloway nor Gamble took any steps to ensure that Aheart's allegations were investigated and Thompson's sexual harassment ultimately ceased. *See* Galloway Dep., at 64-66, App. D, at 69-71a.

Indeed, between May 1995 and June 1996, Leroy Blagmon, another security supervisor, learned of Thompson's ongoing sexual harassment of the petitioner on numerous occasions. *See* Aheart Dep., at 210-41, App. D, at 13-41a. In fact, Blagmon actually witnessed Thompson make many sexually offensive comments to the petitioner over the course of at least a year. *See* Aheart Dep., at 222-24, App. D, at 23-26a. Moreover, on or about June 27, 1996, Blagmon heard Thompson inquire of the petitioner, "you are going to fuck me, huh." *See* Blagmon August 14, 1996 Statement, App. D, at 79a.

The petitioner subsequently complained to Galloway. *See* Galloway Dep., at 60-61, App. D, at 67-68a. Galloway directed her to speak with Robert Brown, the security director at that time. *Id.* Although Brown received a complaint from the petitioner concerning Thompson's misconduct on or about June 27, 1996, Brown's response was in keeping with the other supervisory personnel (i.e., Blagmon, Galloway, and Gamble) who had learned of the petitioner's sexual harassment complaints in the past and done nothing. *See* Brown Dep., at 63-65, App. D, at

76-77a. Brown followed suit. *Id.* The respondent's policy, however, required him to take immediate action. Id.; Associate Agreement for Marriott's Non-Harassment Policy and Marriott's Policy Against Sexual Harassment, at 2, App. D, at 6-7a. In summary, in the face of the petitioner's repeated complaints during the period from October 1994 to June 1996, *none* of the security department management personnel — Galloway, Gamble, Blagmon or Brown — acted in accordance with the company policy, or the Supreme Court's dictates as expressed in *Faragher* and *Ellerth.*

Finally, on or about July 23, 1996, Thompson made another in his litany of crude requests to the petitioner for some "pussy." *See* Aheart Dep., at 244, App. D, at 44a. Instead of making another meaningless effort by reporting this incident to her supervisors in the security department, the petitioner found her way to the respondent's employee relations department. Ultimately, Employees Relations personnel put her in contact with the respondent's Human Relations Director, Joan Muzzillo. Id. *See* Aheart Dep., at 244-46, App. D, at 44-45a.

As a result of Muzzillo's eventual investigation, the respondent terminated Thompson. *See* Brown August 21, 1996 Memorandum to Thompson, App. D, at 82a. Significantly, in an act of admission, the respondent issued Galloway and Blagmon disciplinary warning memoranda for failing to "take immediate corrective action to a complaint of sexual harassment." *See* Brown August 22, 1996 Memorandum to Galloway, App. D, at 80a; Brown August 22, 1996 Memorandum to Blagmon, App. D, at 81a. The respondent also disciplined Blagmon for "not properly handling the sexual harassment complaint of an associate in the work place (sic) that you personally

as a supervisor were aware of." *See* Brown August 22, 1996 Memorandum to Blagmon, App. D, at 81a.

B. The Proceedings Below

Seeking redress for the harassment she suffered over the years, on November 5, 1996 the petitioner timely filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). Thereafter, having exhausted her administrative remedies, the petitioner filed a Title VII judicial claim on November 4, 1997.

The respondent moved for summary judgment on June 15, 1998. During oral argument on the summary judgment motion, the District Court recognized that the petitioner had, in fact, adhered to the respondent's reporting policy when she reported Thompson's harassment to Galloway in October 1994:

> The issue here is whether the petitioner employee, as a matter of law, unreasonably failed to take advantage of preventive or protective opportunities provided by the employer or to avoid harm otherwise. *Now, there's no question that petitioner complied in 1994 with the policy.*

September 10, 1998 Court Transcript ("Court Tr."), at 54. (Emphasis added.) Furthermore, the trial court apparently realized that security department management had an affirmative obligation under the policy to take effective steps in response to the petitioner's sexual harassment complaints:

> And, as I said, the policy that they have established with regard to no zero tolerance seems to me to be more of a matter of reprimand and re-

> sponsibilities of the employer — of the supervisor than it is of the employee, because the supervisor has an obligation to say what he [sees], and if he doesn't act appropriately, he can be reprimanded.

Court Tr., at 59-60.

Nonetheless, notwithstanding its finding that the petitioner had reported Thompson's egregious misconduct as early as 1994, and its seeming understanding of the company policy and the obligations thereof, the District Court granted the respondent's Motion for Summary Judgment on September 10, 1998. Court Tr., at 55-56, 60-61. The trial court determined, in effect, that the petitioner did not reasonably take advantage of the respondent's anti-harassment reporting policy:

> Now, she relies, as I say, on the fact that her supervisors should have known better, and should have done something about it. That may well be, that they should have done something about it. The question is, is there — is she entitled to benefit from their failure to act in these circumstances? . . .
>
> . . .
>
> There is a prompt requirement of prompt action on the part of an employee to come in and tell an employer. I don't find that the plaintiff in this case took advantage of what was reasonable, corrective opportunity down the road. . . . But [the security department supervisors'] failures do not

> — their failures to do their job than simply report up the activity does not revive a cause of action where plaintiff herself failed to pursue the matter prior to that time.

Court Tr., at 55-56, 60-61.

The petitioner timely appealed the District Court's decision. The Court of Appeals subsequently affirmed the lower court's decision on February 22, 2000. The *Per Curiam Panel* stated in relevant part:

> . . . we find that the district court properly found that Marriott proved both elements of its affirmative defense to vicarious liability established by *Faragher v. Boca Raton, 524 U.S. 775 (1998), and Burlington Industries v. Ellerth, 524 U.S. 742 (1998)*. . . .

See Per Curiam Opinion, at 2, App. A, at 2a. The Fourth Circuit subsequently denied her petition for rehearing and rehearing *en banc*. In issuing the foregoing ruling, both the District Court and the Court of Appeals made a significant departure from this Court's established precedent as enunciated in *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth.*

For the reasons detailed below, the petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON VICARIOUS LIABILITY FOR HOSTILE ENVIRONMENT HARASSMENT.

This Court enunciated its position regarding the issue of vicarious liability for hostile environment harassment perpetuated by supervisory personnel in *Burlington Industries, Inc. v. Ellerth,* and *Faragher v. Boca Raton.* This Court explained:

> An employer is subject to vicarious liability to a victimized employee for actionable hostile environment created by a supervisor with immediate (or successively higher authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (**a**) *that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior; and* (**b**) *that the petitioner employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. . . .*

Faragher v. Boca Raton, supra, 524 U.S. at 807-08. (Emphasis added.); *accord Burlington Indus., Inc. v. Ellerth,* 524 U.S at 764-65.

The United States Court of Appeals for the Fifth Circuit expounded upon the everyday applicability of *Faragher/Ellerth* in *Williamson v. City of Houston*, stating:

> When an organization designates a particular person or persons to receive harassment complaints, it sends a clear signal that those persons have the authority to accept notice of harassment problems. In *Faragher* and *Ellerth*, the Supreme Court emphasized that the primary objective of Title VII is to prevent discrimination from occurring, See *Faragher, 118 S.Ct. 2275, 141 L. Ed. 2d 662, 1998 U.S. Lexis 4216,* *56, 57, and that the statute "is designed to encourage the creation of antiharassment policies and effective grievance mechanisms," *Ellerth, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 1998 U.S. Lexis 4217,* *40. To allow employers to escape liability when, as here, the complainant has followed the employer's policy for reporting harassment would undermine these goals.

Williamson v. City of Houston, 148 F.3d 462, 466-67 (5th Cir. 1998).

By contrast, the Court of Appeals in this case concluded, *inter alia*, that:

> the district court properly found that Marriott proved both elements of its affirmative defense to vicarious liability established by *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

See Per Curiam Opinion at 2, App. A, at 2a. Such a holding may have supported the respondent's position if (1) the Marriott "promptly corrected" the behavior about which the petitioner complained; and (2) the petitioner failed to reasonably avail herself of the respondent's sexual harassment policy. However, the contrary evidence presented makes such a holding manifestly unfathomable.

In determining whether to grant a Petition for Certiorari, this Court considers, inter alia, when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." United States Supreme Court Rule 10(c). In the instant case, the Court of Appeals' decision unabashedly contravened this Court's precedence by not adhering to the legal precepts set forth in *Faragher/ Ellerth*. The respondent proffered *no evidence* here demonstrating that it exercised reasonable care to prevent and promptly correct Thompson's egregious behavior. Once the petitioner's supervisors (i.e., Brown, Blagmon, Galloway, and Gamble) received complaints from the petitioner as described *supra*, they were bound to act per the company's policy by initiating an investigation and/or meting out some type of effective disciplinary measure. Instead, the aforementioned supervisors chose not to take *any* action. One cannot reasonably conclude that such stunning neglect constitutes a prompt or effective remedial response, as contemplated in *Faragher/Ellerth*.

Futhermore, nowhere in the record does the respondent illustrate how the petitioner unreasonably failed to utilize the company's preventive and/or corrective measures in grieving Thompson's sexual harassment. Indeed, the petitioner adduced evidence establishing (1) she complained to Galloway in *October 1994* regarding Thompson's sexual harassment; (2) Gallo-

way contemporaneously notified Gamble, the former security department director, of the petitioner's sexual harassment complaint; (3) she complained to Blagmon, her supervisor, repeatedly from *May 1995 to June 1996*; (4) Blagmon observed Thompson repeatedly sexually harass the petitioner during this period; and (5) the petitioner complained to Blagmon, Galloway and Brown in *June 1996*. In response to her numerous complaints, the respondent inexplicably did not undertake *any* action to investigate her allegations or to curtail Thompson's harassment in accordance with its own policies and procedures. *Compare Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999) (determining that the employer failed to implement prompt and appropriate corrective action after receiving notice of a male employee's non-verbal sexual harassment of a female employee).

Yet, the Court of Appeals affirmed the District Court's decision deeming that the petitioner did not avail herself of the company policy. *See* Court Tr., at 60. The trial court and the appellate court have, in effect, "thumbed their noses" at this Court's *Faragher/Ellerth* requirements as well as the petitioner's right to a harassment-free workplace. Notwithstanding the fact the petitioner repeatedly reported her supervisor's sexual harassment to four different supervisors in 1994, 1995 and 1996, the lower courts determined she failed to adequately apprise the respondent of its supervisor's wanton misconduct. The lower courts have effectively gutted *Faragher/Ellerth* of any meaning. Under the District Court and the Circuit Court's "Alice in Wonderland" legal construction, very few, if any, victims could ever conceivably place their employers on notice of their supervisor's sexual harassment.

In addition, even assuming *arguendo* that the petitioner did not comply with the company's anti-harassment procedures,

the appellate court still significantly erred in affirming the trial court's grant of summary judgment. The *Faragher/Ellerth* decisions unmistakenly established a two-pronged, graduated test to be used in determining whether an employer has an affirmative defense to a charge of sexual harassment. *Faragher v. Boca Raton, supra*, 524 U.S. at 807-08. The employer must establish first, that the employer exercised reasonable care to prevent and correct any harassing behavior. *Id. Then*, the employer must establish that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.*

In this case, though, the District Court essentially conceded that the employer failed to satisfy the first prong, yet allowed the employer to establish an affirmative offense by seizing only upon the second prong. Court Tr., at 55-56, 60-61. The District Court pointed out that the security department supervisors failed to do their jobs by not acting to prevent and correct promptly any harassing behavior. Indeed, the District Court stated, "Now, she relies . . . on the fact that her supervisors should have known better, and should have done something about it. That may well be, that they should have done something about it." Court Tr., at 55-56. This alone should have been sufficient to cause the defendant to fail the *Faragher/ Ellerth* affirmative defense test. However, the District Court further stated, "But [the security department supervisors'] failures do not — their failure to do their job . . . does not revive a cause of action where plaintiff herself failed to pursue the matter. . . . " Court Tr., at 60-61. Thus, the District Court conceded that the supervisors failed to do their job! As such, the defendant failed to satisfy the first prong of the affirmative defense test, i.e., "that the employer exercised reasonable care to prevent and correct any . . . harassing behavior." *See Faragher v.*

Boca Raton, supra, 524 U.S. at 807-08. On the strength of *Faragher/Ellerth*, on that basis alone the defendant should have failed in its attempt to establish an affirmative defense. *Compare Ogden v. Wax Works, Inc.*, Civ. No. 991643, 2000 U.S. App. Lexis 12204, at 16 (8th Cir. June 6, 2000) (finding that the employer failed to satisfy the first *Faragher/Ellerth* prong where it "neither conducted the 'through investigation' nor took the 'appropriate action promised in its sexual harassment policy, belying its claim to have exercised reasonable care to 'prevent and correct promptly . . . sexually harassing behavior'").

In effect, the District Court has tortured this Court's holding in *Faragher/Ellerth* by establishing a *disjunctive* affirmative defense test. Even though the District Court recognized that the defendant failed to satisfy the first prong of the affirmative defense standard, the District Court framed the question to be decided as follows, "The question is, is there — is she entitled to benefit from their failure to act in these circumstances?" Court Tr., at 55-56. Having turned a *conjunctive* standard into a disjunctive standard, the District Court then held that the defendant could mount an affirmative defense because the plaintiff failed to reasonably pursue the matter. This is a clear and dangerous departure from the precedent set by *Faragher/Ellerth*.[1]

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[1] Under the lower court's disjunctive standard, a sexual harassment victim subject to open and notorious harassment known to management may not succeed in advancing a judicial claim against the company if she did not lodge a complaint to management. Such a victim may reasonably conclude that management would continue to turn a blind eye to her plight, and that complaining would not result in any relief or, worse, in increased harassment and/or retaliation. Thus, under the perverse interpretation offered by the lower courts here, *Faragher/Ellerth* would in effect, shield supervisors and employers who successfully intimidate sexual harassment victims to remain quiet. *Cf. Burlington Indus., v. Ellerth, supra*, 524 U.S. at 759 ("An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.")

Moreover, as discussed *infra*, it represents a significant departure from cases in other circuits that have properly applied the affirmative defense test.

Clearly, the respondent failed to satisfy either of the prongs of the *Faragher/Ellerth* affirmative defense. How the Court of Appeals could find otherwise suggests that it not only overlooked the material factual matters of this case, but it also consciously ignored the legal precepts set forth in *Faragher/Ellerth*. Indeed, by paying only lip service to this Court's decision in *Faragher/Ellerth*, one can reasonably characterize the Fourth Circuit's legal decision-making below as a travesty. At a minimum, this type of decision sends the negative message to individual plaintiffs that attempting to hold billion dollar corporations accountable for its legal liability is a losing proposition, even if the facts and Supreme Court precedent are on your side. Compounding the panel's manifestly unfair decision is the fact that no substantive decision was issued thereby leaving the parties to wonder as to the basis of their decision. This only adds to the suspicion that billion dollar corporations can escape their legal obligations when battling aggrieved individuals. Given what has transpired, if any case is worthy of the grant of Petition for a Writ of Certiorari, this case would qualify eminently.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS OTHER UNITED STATES COURT OF APPEALS.

Significantly, another basis for which a Petition for Certiorari is granted occurs when "a United States court of appeals has entered a decision in conflict with the decision of another

United States court of appeals on the same important matter." United States Supreme Court Rule 10(a). Rule 10(a) resonates here. In this instance, the District Court and the Circuit Court's decisions here conflict with the post-*Faragher/Ellerth* opinions by other circuit courts which found that a supervisor's notice of sexual harassment of a subordinate was properly imputed to the employer. *E.g. Williamson v. City of Houston, supra*, 148 F.3d at 466-67. The *Williamson* Court commented further that:

> An employer is not insulated from liability simply because an agent fails to perform as he or she is supposed to. *If the HPD policy gave Bozeman the authority to accept harassment complaints, his knowledge can be imputed to the HPD for purposes of liability whether he exercised that authority appropriately or not.*

Id., at 466n. 1. (Emphasis added.)

In a post-*Faragher/Ellerth* case analogous to this one, the United States Court of Appeals for the Eighth Circuit affirmed a district court ruling holding an employer vicariously liable for the actions of a supervisor perpetrated against a subordinate employee. *Ogden v. Wax Works, Inc., supra.* In *Ogden*, a male district manager relentlessly sexually harassed one of his female sales managers by subjecting her to unwelcome physical advances and constant propositions that she refused. *Id.* Despite informing her manager's supervisor of his actions on numerous occasions, the company took no action. *Id.* Indeed by taking no action, the appellate court concluded that the company had forfeited any opportunity to assert the *Faragher/Ellerth* affirmative defense. *Id.* at 16-17. The *Ogden* Court observed:

> Even assuming Wax Works was entitled to raise the defense, it was reasonably rejected by the jury. There was substantial evidence that Wax Works neither conducted the "thorough investigation" nor took the "appropriate action" promised by its sexual harassment policy, belying its claim to have exercised reasonable care to "prevent and correct promptly . . . sexually harassing behavior." According to the testimony of Ogden and others, Wax Works "minimized" her complaints; performed a cursory investigation which focused upon her performance, rather than Hudson's conduct; and forced her to resign while imposing no discipline upon Hudson for his behavior. *See Baty v. Willamette Indus., 172 F.3d 1232, 1242-43* (10th Cir. 1999) (finding the lack of disciplinary action against a harassing employee relevant to an analysis of employer's response). Moreover, the jury could have reasonably concluded Ogden took advantage of the "opportunities" afforded by Wax Works and/or attempted to "avoid harm otherwise." She complained to a member of Wax Works management (Klem), arguably in accordance with the company's sexual harassment policy, and on several occasions directly told Hudson to stop his offensive conduct.

Id. By comparison, the respondent's inaction exceeded the *Wax Works* defendant's non-action.

Likewise, other post-*Faragher/Ellerth* circuit court opinions echo the sentiment of *Ogden*, that an employer's inaction while having knowledge of a supervisor's sexual harassment of

a subordinate will result in liability. *See e.g., Kimbrough v. Loma Linda Development, Inc.*, 183 F.3d 782, 784-786 (8th Cir. 1999) (upholding the trial court's decision imputing liability to employer where it had notice and failed to take corrective action when head chef and kitchen supervisor sexually harassed two female subordinates.); *Williams v. General Motors Corporation*, 187 F.3d 553, 558 (6th Cir. 1999) (reversing the district court's grant of summary judgment where a company supervisor sexually harassed his subordinate, and concluding the case must be decided consistent with the principles set forth in *Faragher/ Ellerth*).

Similarly, since the respondent's anti-harassment policy here assigned Galloway, Gamble, Blagmon and Brown (individually and collectively) "the authority to accept harassment complaints," their knowledge must be imputed to the respondent "for purposes of liability whether [they] exercised that authority appropriately or not." *Id.; compare Glickstein v. Neshaminy School District, et al.*, Civ. No. 96-6236, 1999 WL 58578, at 15 (E.D. Pa. January 26, 1999) (in accordance with *Ellerth* and *Faragher* the district court held that a petitioner chemistry teacher could maintain a claim against her school district for failing to take action in response to her earlier sexual harassment complaints against the science department chairperson); *Chambers v. Trettco, Inc.*, 232 Mich.App. 560, 591 N.W.2d 413, 417 (Mich.App. 1998) (in affirming the decision of the trial court, the appellate court determined that due to the respondent's failure to respond to the petitioner's sexual harassment complaints it remained vicariously liable for its supervisor's harassment against the petitioner in accordance with *Faragher* and *Ellerth*); *accord Sims v. Health Mid-West Physicians Services*, 196 F.3d 915 (8th Cir. 1999).

Thus, in affirming the District Court's legal decision making, the Fourth Circuit inexplicably veered off course from other circuit courts and their interpretation of the *Faragher/ Ellerth* legal precepts. Specifically, as evidenced by the above decisional authority, those circuit courts have consistently held that vicarious liability will attach to an employer of a victimized employee for the actionable hostile environment created by a supervisory level employee. In this case, the evidence undeniably demonstrates that Thompson relentlessly harassed the petitioner and that the respondent egregiously failed to act in any effective manner in 1994, 1995 and 1996. Such evidence establishes how glaringly out of step the Fourth Circuit is in this instance with other United States Court of Appeals with regard to the *Faragher/Ellerth* standard. Thus, in accordance with United States Supreme Court Rule 10(a) as well as 10(c), this Court should grant this Petition for Certiorari, and should ultimately reverse the Fourth Circuit's ruling here.

CONCLUSION

For all the foregoing reasons, in the interest of justice and faithfulness to this Court's recent precedence, this Court must grant the petitioner's Petition for Certiorari, reverse the

lower court's decision, and remand the case back to the district court in accordance with the *Faragher/Ellerth* decisions.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CHARLOTTE AHEART,
Plaintiff-Appellant,

v.

SODEXHO MRRIOTT SERVICE,
INCORPORATED,
Defendant-Appellee,

No. 99-1033

and

MARRIOTT MANAGEMENT SERVICES,
INCORPORATED; MARRIOTT
INTERNATIONAL, INCORPORATED,
Defendants.

Appeal from the United Sates District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge,
(CA-97-3685-PJM)

Submitted; January 31, 2000

Decided; February 22, 2000

Before WILKINS and LUTTIG, Circuit Judges,
and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Eric Steele, Washington, D.C., for Appellant, Todd J. Horn,
Robin B. Bowerfind, VENABLE, BAETJER & HOWARD,
L.L.P., Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(e).

OPINION

PER CURIAM:

Charlotte D. Aheart appeals from the district court's order granting summary judgment in favor of. Sodexho Marriott Services, Inc., on her claim for sexual harassment under Title VII and denying her motion to amend her complaint. Viewing the evidence in the light most favorable to Aheart, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), we find that the district court properly found that Marriott proved both elements of its affirmative defense to vicarious liability established by Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Indus., Inc. v. Ellereth, 524 U.S. 742 (1998). Aheart also appeals from the denial of her motion to amend her compliant to add a claim under the Montgomery County Human Relations Act. In light of the dismissal of Aheart's federal claim, we find no abuse of discretion in the district court's denial of her motion to amend. See Foman v. Davis, 371 U.S. 178, 182 (1962).

Therefore, we affirm the order awarding summary judgment to Marriott and denying Aheart's motion to amend her complaint. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 11, 2000

No. 99-1033
CA-97-3685-PJM

CHARLOTTE AHEART
Plaintiff – Appellant

v.

SODEXHO MARRIOTT SERVICES, INCORPORATED
Defendant – Appellee

and

MARRIOTT MANAGEMENT SERVICES, INCORPORATED; MARRIOTT INTERNATIONAL, INCORPORATED

Defendants

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en bane was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en bane, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en bane is denied.

For the Court,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLOTTE AHEART

Plaintiff

v. Civil No. PJM 97-3685

SODEXHO MARRIOTT SERVICES, INC.

Defendant

SEP 14 1998

ORDER

Upon consideration of Defendant's Motion summary Judgment and Plaintiff's Opposition thereto, it is for the reasons stated on the record this 10 day of September, 1998

ORDERED that Defendant's Motion is hereby GRANTED; and it is further

ORDERED that judgment is hereby ENTERED in favor of Defendant and against Plaintiff; and it is further

ORDERED that the Clerk of Court shall CLOSE this case.

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

ASSOCIATE AGREEMENT FOR MARRIOTT'S NON-HARASSMENT POLICY AND MARRIOTT'S POLICY AGAINST SEXUAL HARASSMENT

Marriott Corporation is committed to providing you with a work place that is safe, comfortable and free from harassment. It is our Company's policy to prohibit all forms of harassment at work, including harassment based on age, race, color, religion, sex, sexual orientation, national origin, disability or veteran status.

All associates are responsible for complying with Marriott's Non-Harassment Policy and Policy Against Sexual Harassment. Copies of both polices are attached to this agreement and you should read these carefully before you sign the attached Associate Pledge form.

(1) *Marriott's Policy Against Sexual Harassment prohibits unwelcome sexual advances, requests for sex (with or without related threats or promises of favors or other benefits), or other benefits), or other verbal or physical sexual conduct which could have a harmful effect on your work performance or create a hostile or offensive work environment.*

Examples of "sexual harassment" include:

- *obscene or Sexually suggestive comments about a person's body;*
- *"off-color" language or "dirty" jokes of a sexual nature;*

- *slurs, threats, repeated comments or other offensive verbal or physical conduct relating to a person's sex or sexual orientation;*

- *offensive or unwelcome sexual flirtations, advances or propo*sitions, communicated verbally or in writing;

- *use sexually degrading words to describe a person or group of people;*

- *any display of sexually explicit photographs, drawings, greeting cards, articles, books, magazines or other printed items; or*

- *repeated unwelcome or unnecessary touching of any part of another person's body.*

(2) *Sexual and other forms of harassment at work art strictly prohibited, whether committed by associates (management or non-management), vendors, guests, clients or customers. Under Marriott policy, managers/supervisors can not threaten or imply that giving into or rejecting sexual advances will influence any decision regarding your employment.*

(3) *Sexual and other forms of harassment by any associate will result in disciplinary action up to and including dismissal, and may lead to personal legal and financial liability. You are strongly, encouraged to use Marriott's Guarantee of Fair Treatment complaint procedure if you believe you have been subjected to any foam of harassment at work or during a work-related activity.*

(4) *Complaints of sexual and other forms of harassment at work will be promptly and carefully investigated. Under Marriott policy, your manager or supervisor can not retaliate or try to harm you in any way if you choose to file a harassment complaint.*

(5) *If you have concerns about harassment or work by anyone, including managers, supervisors, co-workers, guests, clients, customers or visitors, you should immediately bring those concerns to your manager's attention or you may contact ANY manager or supervisor with whom you feel comfortable discussing the situation. Note: A sexual harassment questionnaire can be provided to you upon request. However, use of the questionnaire is not required to complain about sexual harassment or for management to address your concerns.*

(6) *If possible, you should bring your concerns to the attention of your immediate manager or supervisor. However, If the unwelcome behavior involves a manager or supervisor to whom you directly or indirectly report, you can also seek help from any other manager, your human resource representative, division/regional vice president of human resources, or the MMS Employee Relations department (1-800-774-7371).*

(7) *The Company's investigation may include interviews with all persons having direct knowledge of the unwelcome behavior, including the person who made the complaint, the person accused of sexual harassment, and other potential witnesses.*

(8) *Your privacy and the privacy of the person accused of sexual harassment will, to the extent possible, be kept strictly CONFIDENTIAL.*

(9) *At the conclusion of its investigation, the Company will review its findings with the person(s) who made the complaint. If the investigation reveals that the complaint is factual, appropriate corrective action will be taken to prevent the harassment from occurring again, up to and including discharge of any associates believed to be guilty of sexual harassment. In any case, particularly in situations where the facts uncovered during the investigation are inconclusive or unclear, management will ensure that all parties are reacquainted with the Company's policy prohibiting sexual harassment at work.*

ASSOCIATE'S PLEDGE

As a term and condition of my employment, I, Eddie Johnson (print your name), have read the Associate Agreement for Marriott's Non-Harassment Policy and Policy Against Sexual Harassment consisting of two (2) pages and Marriott's Non-Harassment Policy and Policy Against Sexual Harassment, and I agree not to engage in any form of harassment set forth in the Associate Agreement or the above policies.

I also acknowledge that on the date below, I received copies of Associate Agreement, Non-Harassment Policy and Policy Against Sexual Harassment for my personal use and future reference.

5-18-94
Today's date

Your signature

VOLUME I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLOTTE AHEART, Plaintiff	*	CIVIL ACTION No. PJM-97-3685
	*	Baltimore, Maryland
vs.		
	*	April 22, 1998
MARRIOTT MANAGEMENT SERVICES, INC., Defendant	*	

* * * * *

Deposition of CHARLOTTE AHEART, a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Charlotte Aheart is the plaintiff, and Marriott Management Services, Inc., is the defendant, pending in the District Court of the United States for the District of Maryland, before Susan E. Smith, a Notary Public in and for Baltimore County, Maryland, at 2 Hopkins Plaza, Baltimore, Maryland 21201, at 9:05 a.m., April 22, 1998.

* * * * *

Reported by:
Susan E. Smith, CSR

grabbed my breasts. We were two officers alone at that main reception area.

Q. What were you doing? What was happening between you that caused him to do that, do you recall?

A. He just, like, came behind me, like, came not -I can't recall exactly, but it was an off-guard type thing. It was not like I seen his hand and he was coming. He, like, got me off, like acting like he was coming to do something else, and then touched my breasts.

Q. How long was his hand actually on your breast?

A. Not long. It's enough to, you know, hit him off, get off. So it had to have been like a second or two.

Q. Okay.

A. Maybe a second.

Q. What were you all talking about, the nature of your conversation you had, when this happened?

A. I don't remember. I don't recall that we were talking at all.

Q. You don't remember the nature of the conversation?

A. We don't — no. It was like he came up -that's the way, he came up unexpectedly. It wasn't like it was foreseen.

Q. You indicated a moment ago, I think you said you all were funning around?

A. He was, like, funning around.

Q. What does that mean?

A. He had this gypper attitude, which he always had this gypper attitude, whether anybody was paying attention to him or not. I mean, it could have been a somebody, an employee passing by he could have been talking with, or whatever. The way the post is set up, I mean, you would have to see the way it's set up to know. You know, there's one person in front, one in the back. So we sat separately. So he was coming, he was walking around. He would always walk around as if he was doing something else.

Q. What did he do after you knocked his hand away, after he touched your breast? What he did do?

A. Tried to start, you know, laughing it off, just trying to —

Q. Did you tell him that he shouldn't go that or that it was inappropriate?

A. Yes, I did.

Q. What did he say to that?

A. Tried to skip the subject.

Q. Did he apologize?

A. No.

Q. You went and reported this to your supervisor, Donald Galloway, at the time?

A. Yes.

Q. Did you have a meeting with Mr. Galloway and Mr. Thompson about this incident?

A. Yes

Q. What happened at the meeting? What was said?

A. I informed him that I didn't like it, and informed Galloway. And if I'm not mistaken, he tried to switch it upon me, as if I did something to him first. And I just remember Galloway getting upset and told Leo, See, that's why I don't tolerate the playing, saying that to him, getting upset. You know, got upset with the whole situation. He was kind of furious with the whole situation.

Q. Did Mr. Thompson admit to Mr. Galloway that he had touched your breasts?

A. I don't recall. I think — I don't recall.

Q. You write in here Mr. Galloway made it clear to Mr. Thompson that his actions would not be tolerated. Is that in to reference to his inappropriate touching of you?

A. Yes.

Q. You indicated I did not want anything done to Mr. Thompson, all I wanted was for him to stop, and I felt that going to my supervisor would solve the problem. When you say you didn't want anything done to Mr. Thompson, what do you mean?

A. Fired.

Q. During this meeting, did Mr. Galloway indicate whether or not he was going to take any action against Mr. Thompson, notwithstanding your statement that you didn't want anything done to him?

A. He didn't state it, but he took action.

Q. What action did Mr. Galloway take against Mr. Thompson?

A. Well, he kept us apart. That's the action he took. It wasn't against — I don't know if he did anything, or if he gave counseling, or whatever. I don't know, as far as that part. But I know that the action that he took was, you know, on my behalf, that, you know, something had to be done for it to be stopped. And I told him I wanted something to be done, and he made sure we weren't together, you know, didn't work the post together like we were when this happened.

Q. Did he meet with you pretty quick after you complained to him about this incident?

A. Yes.

Q. Why didn't you report this to human resources? Were you satisfied that Mr. Galloway's response was appropriate or —

A. All I knew was to go to the supervisor at that time. I didn't learn about going further. I had it that once the supervisor got it, they would do what they needed to do.

Q. You knew human resources was there to investigate complaints of sex harassment, though, right?

A. I was not familiar with it at the time, at this time, this incident.

Q. Well, this incident I believe you said took place approximately July of 1994, in that range?

A. Right.

Q. Okay. You also testified a little bit ago that you were interviewed by Dolores Coe in April of 1993 in connection with Mr. Munyoni's allegations?

A. I was interviewed by Gamble, and Coe was in on the meeting.

Q. Let me finish my question, because that's not what I'm talking about. You also testified that in about April of 1993 you were interviewed by Ms. Coe in connection with Mr. Munyoni's allegations of sexual harassment against Mr. Blagmon, correct?

A. Right.

Q. Okay. So you knew that human resources was available to investigate claims of sexual harassment at this time Mr. Thompson touched you?

MR. STEELE: Objection. That's a mischaracterization of her testimony.

Q. Is that correct?

MR. STEELE: You can answer it.

A. You have to repeat it again for me.

Q. Why didn't you — strike that. As a result of your statement that Mr. Galloway told Mr. Thompson that his actions wouldn't be tolerated and that you didn't want anything done to Mr. Thompson, that you just wanted him to stop, is that the reason you didn't go to human resources after you raised this complaint to Mr. Galloway?

MR. STEELE: Objection, asked and answered. You can answer it again.

A. He kept us apart from each other, so I didn't have any — I didn't — he stayed around me, if I was by myself. He made sure that Leo Thompson and I had no communications.

Q. As a result of this action Mr. Galloway took, at this time you were satisfied that he had taken appropriate action in response to your complaint; is that correct?

A. Not completely, no.

Q. Okay. What is incorrect about that?

A. Because I felt there was really, we were both really left with improper information on being counseled, or whatever, for this situation. It's like no more information was given, you know. Because if I would have gotten more information on probably what to do, I probably would have, you know — or have him have counseling for future purposes.

Q. The next incident you talk about occurring with regard to Mr. Thompson takes place after April 1995 when he was promoted to supervisor; is that correct?

A. Yes.

Q. Now, you state in the second paragraph, During the same time I had been served a written warning. Is that the written warning we talked about?

A. Exactly.

Q. You state in parentheses, In spite of having to deal with these situations, I still continue to perform my job duties very well. What do you mean by that?

A. That I worked hard towards not letting what I was being put through interfere with my job performance.

Q. Did Mr. Thompson's actions toward you ever interfere with your ability to do your job?

A. Yes.

Q. Later on down in the sentence, in that paragraph, you say I also trained him — I think you're referring to Mr. Thompson — in certain areas. In what areas did you train him?

A. The different things to do at the different posts. When a newcomer comes in, at first there was no one designated for training when he came in, just if, you know, if I was at the main reception desk, then I would train him on things that were done at the main reception desk.

Q. The next incidents you talk about, you indicate that he started making sexual comments to you sometime after he became a supervisor. Do you see that?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. You say he made gestures about your breasts. What does that mean? What do you mean by gestures?

A. He would like fix his hands like he was going to palm something or grab something.

Q. Like he would pretend like he was going to grab your breasts?

A. He would just hold his hands and just make the gestures as if he was grabbing on.

Q. Did he do this in front of anyone?

A. Yes.

Q. Who did he do that in front of?

A. That one particular gesture, I'm not sure, but he made other gestures towards my breasts.

Q. I'm going to go through them, because I know they were repeated. I mean, we've got eight pages of several things. But I want you to focus on this incident, if you could, and let me know who was there who witnessed that, if you can recall.

A. Carlos Rondan witnessed the breast, if I'm not mistaken. Well, Macgill Clottey, Mervyn Mitchell. And I'm quite sure there were other officers, but those are — being so embarrassed, I didn't even want to look around and see who was paying attention for some of the incidents that happened.

Q. All right. You said he made some sexual comments to you.

A. Yes.

Q. You indicate here, I would sure love to tit fuck you, and he would stand in front of me, bent down with his head in front of my breasts, pretending like he was shaking his head between them. Do you recall any other sexual comments at this time right here, other than the one you relayed in this memo?

A. You mean all the ones in this period?

Q. Well, I'm just trying to chronologically go through them. And this particular one at the bottom of 1 page 1, you said sexual comments, and you gave that. Is that the sexual comment you're referring to?

A. This was as an example of one, yes.

Q. All right. Let me ask you this. Maybe we can cut some time out and not be duplicative. Taking all the incidents of sexual harassment that Mr. Thompson exposed you to, were any of them witnessed by the director of security?

A. Not that I'm aware of.

Q. Were any of them witnessed by Mr. Blagmon?

A. Yes, comments.

Q. Were any of them witnessed by Mr. Galloway?

A. Not to my knowledge.

Q. When did Mr. Mitchell become a supervisor?

A. May of '97.

Q. During the time Mr. Thompson was sexually harassing you, what supervisors, other than Mr. Blagmon, saw him sexually harass you?

A. Mervyn wasn't a supervisor at the time he witnessed.

Q. So Mr. Blagmon was the only supervisor who observed Mr. Thompson sexually harass you, that you recall?

A. That I recall.

Q. What did Mr. Blagmon, what did he observe? I think you said comments.

A. Yes, mainly.

Q. If you could, please tell me what Mr. Blagmon saw Mr. Thompson do to you or say to you.

A. Well, one incident he witnessed him, you know, just ask me the same, Aheart, we're going to fuck, aren't we? And another incident he would say to Mr. Blagmon that we're going to double-date, mom and daughter. You know, you can take her mom and I'll have Aheart, you know, gestures of dating or having sex.

Q. Let me back up. You stated that Mr. Thompson said to you in front of Mr. Blagmon, Aheart, are we going to fuck?

A. We're going to fuck, aren't we? Or something like that.

Q. Is that pretty much as close as you can to a quote?

A. As close as I can. I think I put it in here. It's in here somewhere.

Q. Is that on page 4, second paragraph?

A. Yeah. We're going to fuck, aren't we?

Q. That's the incident that Mr. Blagmon observed, that you just reflected?

A. That's one of them.

Q. Any other instances in which Mr. Thompson said or did anything to you that Mr. Blagmon observed?

A. Just about?

Q. Double-dating?

A. Yeah, him having my mom, Leroy with my mom, and he and me, just constantly always saying stuff about being with me sexually.

Q. Well, it looks like this comment Mr. Thompson made to you, We're going to fuck, aren't we? this reference on page 4, took place in approximately on June 1996. Is that in the range?

A. Yeah, I guess. Yeah, this was all close, yeah.

Q. You say in here Mr. Blagmon stated for me to say nothing to him and for me to walk away. Tell me, if you would, exactly — flesh out for me what happened on that instance where Mr. Thompson made that comment, in front of Mr. Blagmon.

A. Okay. He was — he had this — I was either coming down the hall or getting off the elevators, and him and Mr. Blagmon was talking in the hallway on the lower level, almost towards the loading dock where our main Station I is. And when I was getting off, he stopped and was like, A. And when I stopped and listened, he just said, you know, what that man said, We're going to fuck, aren't we? And I'm just like put my hand in front of his face. And Leroy was like, Don't answer him. You know, just come on, come on, come on, don't say nothing, like don't say anything to him, and just got me away from the situation.

Q. Okay. Why didn't you report that to human resources?

A. Because it was blatantly being done, you know, constantly. You know, it wasn't a hidden thing. So, you know, at that time I didn't feel comfortable with human resources. Human resources does not have my confidence at all.

Q. You indicated another time Mr. Thompson said in front of Mr. Blagmon something about double-dating, you and your mother?

A. Um-hmm.

Q. I don't recall reading that in here. Is that —

A. I didn't. As you could tell at the end of my — I said there's more. You know, it's eight pages. If I put everything in there, I would have never gotten the statement to Joan.

Q. Okay. Do you remember when that double-dating comment took place?

A. No. That was a constant thing he used to always play with, you know.

Q. How many times did he say it in front of Mr. Blagmon?

A. I'm not sure. It was several times. That's the only one he would kid with that with. He would just always say that and laugh it off.

Q. That's one thing he repeated on several times?

A. That's something he would — like, if it happened that we three were in the same situation, I guess he called it breaking the ice or used it to break the ice, I guess. I don't know. He just — that's something he constantly did.

Q. Was that an ongoing joke for him?

A. It was a joke for him. It was something that he — an ongoing thing that he loved to say or joke with, I guess.

Q. Did that particular phrase bother you?

A. To a certain degree.

Q. In what respect?

A. It bothered me. But I worked hard at not, trying not to let it bother me.

Q. I imagine some things he said bothered you more than other things?

A. Exactly.

Q. Is the double-dating something that didn't bother you as much as the comments about Are we going to tuck?

A. Right.

Q. Is that a fair

A. I think that was maybe one of his mild comments.

Q. Do you recall the dates on which Mr. Thompson made these comments about double-dating in front of Mr. Blagmon?

A. No, I don't.

Q. Do you recall any other instances of sexual harassment, statements or gestures, Mr. Thompson made in front of Mr. Blagmon, that we haven't already discussed?

A. In front of Mr. —

Q. Blagmon.

A. By himself, or along with me? I don't understand.

Q. I want to find out the instances, all occasions in which Mr. Blagmon witnessed Mr. Thompson calling —

A. Doing something to me directly?

Q. Yes, yes. And we discussed these double-dating statements and the other statements regarding, Aheart, are we going to fuck. Are there any others that you recall?

A. He would make comments to both — he would always compliment me, like my hair, and then he would say, I would love to mess that up. That was taken offended, offensively.

Q. Did he say that in front of Mr. Blagmon?

A. To my knowledge, I'm quite sure one of the occasions, yes. That's something, that was another ongoing, ongoing joke for him.

Q. I want to mess up your hair?

A. Yeah. I would love to mess that up, you know.

Q. Do you recall specifically him ever making that statement in front of Mr. Blagmon?

A. He made so many comments, I can't distinguish which ones. All the ones that I — yeah, those are the ones right now, to my knowledge, that I can definitely say Leroy was there. There's so many comments, it's ridiculous, so I couldn't — right now I can't cipher it out.

Q. To the best of your recollection, Mr. Thompson made statements to you in front of Mr. Blagmon to the effect of, Aheart, we're going to tuck, aren't we? made comments on several occasions regarding double-dating you and your mother, and comments on several occasions about wanting to mess up your hair?

A. Yeah, most — yeah, a lot of things he would uncomfortable. He would whisper, which I knew they had to be — he would whisper stuff to him that I couldn't hear, but give me eyes as if — so, you know, I took them as, I took them as sexual. I took it as sexual harassment, you know.

Q. Let me cover first the ones you know about, that you actually know Blagmon observed or heard.

A. Okay.

Q. Have we covered the waterfront on that?

A. To the best of my knowledge.

Q. Other than that, other than Mr. Blagmon and perhaps I have asked you this already, and I apologize if I have, but other than Mr. Blagmon, you're not aware of any other supervisor who observed Mr. Thompson's sexually harassing conduct towards you; is that correct?

A. No other supervisor that I know of, no.

Q. Okay. Now, we have the instance in approximately July of '95, when you reported to Don Galloway the incident where he touched your breasts. And I recognize that that's a big approximation, somewhere in that time frame, okay.

A. Yes.

Q. And then I also know that in June of 1996, you brought to Mr. Brown's attention Mr. Thompson's inappropriate behavior, correct?

A. Exactly.

Q. Between those two times, had you reported to anyone else in a supervisory or management position that Mr. Thompson was sexually harassing you?

A. Yes.

Q. Who would that how

A. Donald Galloway.

Q. Anyone else?

A. No.

Q. Okay. When did you report to Don Galloway, following that first occasion in 1997, that Mr. Thompson was sexually harassing you?

A. That Monday following the CPR, that Monday or Tuesday.

Q. That was immediately prior to your complaint to Mr. Brown, right? Is that the situation in the parking lot where Mr. Thompson followed you out to the car?

A. Yes, exactly.

Q. And said he wanted to have sex with you and invited you to the apartment?

A. Exactly.

Q. You reported that to Mr. Galloway?

A. Exactly.

Q. Mr. Galloway urged you to talk to Mr. Brown about it, and you did, eventually you did?

A. Yes. He said you definitely need to do something, you know, more about it this time.

Q. Okay. Other than that incident, which I think you talked about in your paper here, other than that incident, had you reported to anyone in Marriott, supervisors or management, that Mr. Thompson was sexually harassing you?

A. Prior to that?

Q. Well, we have the incident in 1995 where you reported to Don Galloway that he had touched your breasts.

A. Um-hmm.

Q. We have the situation in June of 1996 in which you reported to Mr. Galloway the parking lot incident —

A. Yes.

Q. — which resulted in the same complaint to Mr. Brown, bring it to his attention.

A. Exactly.

Q. And then the following August resulted in the written complaint to Ms. Muzzillo?

A. Yes.

Q. Okay. Other than those, are there any other instances in which you brought to Marriott's management's attention Mr. Thompson's sexually harassing conduct?

A. You mean any other occasions or any other people?

Q. Either one.

A. There were — I went to, when it continued, I went to — let me think. I went to a couple of people twice, a couple of times, for it, to get some help.

Q. Who were these people?

A. Well, after I complained about it, I was being just so frustrated, trying to —

Q. Is this approximately August of '96 that you're talking about these other people?

A. All these — they're the same people, but it's just, you know, trying to get some help. That's why I actually was — occasions or people?

Q. Well, I think I understand now. Let me see if I can explain this. See if I'm correct. You complained to Don Galloway in the summer of '95 that Mr. Thompson had touched your breasts. We discussed that, correct?

A. Right.

Q. The next occasion you complained to Marriott, someone in Marriott supervision or management, was in approximately June of 1996, when you reported to Mr. Galloway the incident in the parking lot. He suggested you see Mr. Brown about this, and you did. Thereafter, in late July/ early August 1996, you brought your complaints to the attention of Marriott employee relations, who referred you to Ms. Muzzillo, and then the investigation proceeded as we discussed. Is that an accurate summary of your complaints?

A. I complained to Leroy about it, because he was witnessing them, and I complained. He was like the only one that I felt comfortable to — and he was a supervisor, and I'm figuring he's a supervisor, he's seeing this, maybe he'll get the word out.

Q. And any other complaints, then, to Marriott management or supervision, that we haven't discussed?

A. No. You mean to people that I talked with?

Q. Right.

A. No other people that I can recall right now.

Q. With regard to Mr. Blagmon, are you telling me that when he, on the occasions when he would observe these comments by Mr. Thompson, you told him that you thought this was inappropriate? Is that what you mean by complaints?

A. Well, no. I complained to him. You know, I told him I didn't like it and that I, you know, was uncomfortable with it. And, you know, he just, he informed me that when I'm not around, he would discuss me sexually also.

Q. Do you remember the dates on which you made these complaints to Mr. Blagmon?

A. No, just — maybe I considered them venting instead of — but they were — I was venting, but they were complaints, you know.

Q. Well, did you want him to take action?

A. I wanted him to help. He informed me that there was probably nothing, you know, he could do either.

Q. Well, did you ask him to take action against Mr. Thompson?

A. I talked, we talked about it. Yes, we talked about it.

Q. I mean, did you specifically say, I want you to take action against Mr. Thompson as a result of this?

A. I didn't think he could, since — I didn't think he could, since he wasn't my immediate supervisor.

Q. So the answer is no?

A. No, yeah.

Q. No, yeah? I mean, you didn't tell Mr. Blagmon that you wanted him to take your complaints regarding Mr. Thompson to the next level or that you wanted him to do something to Mr. Thompson; is that correct?

A. I asked him could he help me, but I didn't know if he could do anything, SO I didn't ask him, like, can you please do something. I didn't know that he could, by him not being my immediate supervisor. But I asked him if he could help me, and he informed me that there was probably nothing I could do because, you know, Leo was supported.

Q. Leo was what?

A. Supported. When did you have this conversation with Mr. Blagmon?

A. Supported.

Q. When did you have this conversation with Mr. Blagmon?

A. I don't remember the dates.

Q. Do you remember the year?

A. Probably early '96' early '96.

Q. Why did you not bring Mr. Thompson's anyone to the attention of Mr. Brown until late June, 1996?

A. Because I was informed that's who Leo was supported by, GO I didn't feel comfortable going to him.

Q. Who informed you that?

A. Leroy Blagmon.

Q. Other than the fact that Mr. Blagmon told you that Mr. Brown was supportive of Mr. Thompson, was there any other reason you did not go to Mr. Brown with your complaints about Mr. Thompson?

A. I didn't feel comfortable with him, with talking to him about it.

Q. IS that because of the nature of Mr. Thompson's conduct?

A. And the nature of his conduct towards me.

Q. Explain to me why, if you would, why you didn't go to him sooner. I mean, you went to him in June of 1996, so what changed?

A. That was my final — there was nothing else I could do. I had — there were SO many people who witnessed it, who was like, You've got to do something, you've got to do something, this is ridiculous. And before, the way I was not comfortable, was Bob Brown, the way I was treated by him.

Q. What do you mean, treated by him? What did he do to you that led you to believe you could not complain to him about Mr. Thompson's actions?

A. Just very cold with me, bringing up my faults, you know, bringing up the write-up. Even one incident, he slammed a door in my face while I was talking with him. This was all while before he became director.

Q. These have to do with employment-related performance problems you had?

A. Just that one. It was held over my head.

Q. Any other reason you didn't bring your complaints to the attention of Mr. Brown earlier, other than the fact that you felt he was cold towards you and you believed he supported Mr. Thompson?

MR. STEELE: Objection, mischaracterization of her testimony.

Q. Is it accurate that you didn't go to Mr. Brown earlier because you were told he supported Mr. Thompson and you thought he was cold to you?

A. He was cold to me.

Q. Are those the reasons you didn't go to him earlier?

A. Those were, yes, those were my major reasons I can just call off my head right now.

Q. Okay. Mr. Gamble left the employ of — or left the security director position in approximately June excuse me, strike that.

Mr. Gamble left the security director position in approximately February 1996. I believe we talked about that, right?

A. Yes.

Q. Why did you not go to him with your complaints regarding Mr. Thompson?

A. Because he wouldn't never speak to me. Any time I wanted to talk to him about any issue, he would avoid it. He would avoid me.

Q. Did you ever leave him any voice mails or draft him any memos indicating that Mr. Thompson had sexually harassed you?

A. No.

MR. STEELE: Take a break before you ask your next question.

(The deposition was recessed at 4:00 p.m. and resumed at 4:10 p.m.)

MR. HORN: Back on the record.

Q. During our break, did you have any conversations with anyone concerning the substance of your testimony?

A. No.

Q. Before the break we were talking about Mr. Gamble and that you never brought to his attention any complaints about Mr. Thompson. And I asked you why, why you never complained to Mr. Gamble, and you said because he was tough to reach, tough to talk to, correct?

A. Exactly.

Q. You did testify, however, that when you complained to Mr. Gamble that Mr. During had inappropriately touched your breasts, he brought human resources in and took care of the situation, right?

A. Yes.

Q. Okay.

A. Well, well, I guess he took care of the situation.

Q. Well, given the fact that you had relied upon Mr. Gamble to remedy sexual harassment in the workplace with another employee, why did you not bring it to his attention that Mr. Thompson had been sexually harassing you?

A. Because he didn't want to deal with me, and he was the same, almost a replica of the feelings that I had for Bob Brown.

Q. Once you brought these complaints to Bob Brown's attention — strike that.

As far as bringing complaints about Mr. Thompson to the attention of human resources, the first time you did that, I believe you testified, was in approximately early August 1995, correct?

A. The first time I did?

Q. Brought to human resources' attention Mr. Thompson's sexual harassment towards you, was in early August 1996?

A. '96.

Q. Correct?

A. '96, yes.

Q. Why did you not go to human resources earlier with complaints about Mr. Thompson's sexually harassing you?

MR. STEELE: Objection, asked and answered. You can answer it again.

A. I didn't feel comfortable. I didn't feel comfortable. When I went before, I didn't feel comfortable. When I went before for the write-up, I didn't feel I was treated fairly there, so I didn't feel comfortable going back there.

Q. Are you referring to the write-up regarding your attendance?

A. Yes, the only write-up I had, that I know of.

Q. Any other reason you did not go to Ms. Muzzillo earlier, other than that situation with the write-up?

A. I just, I didn't feel comfortable.

Q. And that's because of the way the write-up was handled?

A. Exactly, the way everyone was handling me, period.

Q. You got the write-up in mid 1995, correct?

A. Exactly.

Q. Okay. And you had your conversation with Ms. Muzzillo in mid 1995 regarding the write-up?

A. Yes, but I was getting a hard time before the write-up came.

Q. My question is, you got the write-up and had a conversation with Ms. Muzzillo in mid 1995, correct?

A. Exactly.

Q. Why, prior to your conversation with Ms. Muzzillo, did you not bring to her attention Mr. Thompson's actions towards you?

A. Mr. Thompson had just became supervisor at the time of my write-up. He just became my supervisor, I think, almost —

Q. Simultaneously?

A. Well, on the day, because he was there when Galloway gave me the write-up. So he was my supervisor. And Galloway kept us apart from each other, so the sexual harassment didn't start again until after, the strong sexual harassment didn't start again until after that.

Q. How long after that did the strong sexual harassment begin?

A. I can't be exactly sure. It wasn't — once he realized I couldn't get any help from anyone.

Q. Do you remember the date?

A. Almost, almost immediately, really.

Q. Why did you not report Mr. Thompson's sexual harassment to the corporate employee relations department until August 1996?

A. I did not know that it existed. I did not know they existed.

Q. Any other reason?

A. Just lack of knowledge as far as where to go, where else to go to get help.

Q. How did you find out they existed?

A. I'm not exactly sure, but I did research on further help with people I know in my personal life that has been of management level.

Q. You knew that there were people employed in Marriott's human resources department other than Ms. Muzzillo, correct?

A. Administrative, but not as far as our human resource person who we can go talk to. No, I didn't know there were other people.

Q. Why didn't you go to Dolores Coe regarding any complaints of discrimination, or, excuse me, any complaints of harassment by Mr. Thompson?

A. Dolores Coe wasn't my human resource person when Joan was.

Q. Was there any other reason you did not go to Ms. Coe, other than that?

A. I didn't feel comfortable. The case with Walter During, it was treated against me

Q. How so?

A. — per se. Saying as if I was trying to get back at him for something. Or just because he was irate at me, that I added what he did to me later. And so they weren't pleasant at all, so I didn't feel comfortable.

Q. Turning to late June, 1996, after the incident in the parking lot where Mr. Thompson "asked me if he could give me some head," do you remember that?

A. Yes.

Q. When you brought it to the attention of Mr. Brown on that voice mail message —

A. I didn't tell him on the voice mail message. I told him I needed to speak to him.

Q. You needed to speak to him confidentially about something?

A. Exactly, to meet with him confidentially.

Q. And then the next day Mr. Brown asked you what the problem was?

A. Came by and, yeah, and asked.

Q. And set a meeting with you on —

A. Yes, and set a meeting.

Q. And then had that meeting, looks like the next day, June 27, had a meeting with you?

A. Yes. I don't recall the dates unless I look at it also.

Q. I'm on page —

A. I've got it, June 27. Okay, yes, the 27th.

Q. So on June 27 you had a meeting with Mr. Brown in which you informed him about Mr. Thompson's sexually harassing actions toward you, right?

A. Yes.

Q. Okay. How long did your meeting with Mr. Brown

A. I'm not sure.

Q. Was it all day?

A. No.

Q. Half a day?

A. No. I'm not sure. I could say —

Q. A couple of hours?

A. No. Probably maybe an hour, if that was given.

Q. And in there, did you kind of give him the history of Mr. Thompson's actions towards you?

A. I explained to him what was happening now and that I had problems in the past with him.

Q. Now, at this time did you tell him that you wanted to keep this confidential for the time being?

A. During our conversation, no, I wanted the meeting, us meeting to be confidential.

Q. Oh, your meeting with Mr. Brown confidential?

A. Exactly.

Q. You didn't want him to —

A. I didn't want other people to know that I was going in to meet with him.

Q. And he agreed to keep it confidential, but told you that if Thompson makes any further sexual advances towards you, he could not keep it confidential. Is that what he told you?

A. That's what he told me.

Q. Okay. And you agreed with this?

A. I told him that I tried, I tried it before. I had tried this before, working with it myself. He was like, Let's keep this in the department.

Q. If I understand this correctly, you wanted to keep this confidential. He told you, though, if any further misconduct by Mr. Thompson, he can't keep it confidential, and, quote, I agreed. Is that the gist of your conversation with Mr. Brown?

A. Right. That's all I could get out of him, so I accepted whatever I could get out of him.

Q. Later you had a meeting with Mr. Thompson in which he told you he was joking about the parking lot incident, that his wife wouldn't let me five feet from her?

A. Yes. He came back during my shift to see me.

Q. Now, is the next incident of sexual harassment, after your meeting with Mr. Brown on June 27, 1996, the incident on July 23 in which Mr. Thompson whispered to you, I want some pussy?

A. Yes. This was after. Well, yeah.

Q. And that triggered you to make the phone calls to the employee relations department and then Ms. Muzzillo; is that correct?

A. That's part of what triggered me.

Q. Well, what was the event that — I'm looking on the last two pages. I mean, you relay the incident on July 23 where you indicated he whispered to you, I want some pussy. And then you indicated you started making some phone calls, which I believe was to the employee relations department, who referred you to Ms. Muzzillo, and then you gave her the written complaint, and then you had the investigation.

A. Right. But that wasn't the only incident that made me go and complain. That's what I'm saying. That' the one I wrote about that this is ridiculous, this is getting outrageous. That's part of what —

Q. You're talking about all this other stuff that's written in here. I mean, obviously it was all part of one motivating thing.

A. No, I'm talking about during the same incident, during the same time, during that same time —

Q. Oh, he said something else?

A. He said — no, when he said something, he said something — when he said something about that, I —

Q. Well, looking on July 23, 1996, did he say anything to you, other than what you relay here: He said, I want some pussy. My mouth dropped and he started to laugh it off.

A. Right. So that showed that nothing was getting done about my complaint, that there is nothing, that nothing was getting done.

Q. So that's when you took it to the employee relations?

A. I felt that I had no other choice.

Q. And you went to the employee relations department?

A. Yes, to get some guidance.

Q. And then they referred you to Joan Muzzillo?

A. Yes.

Q. And then you met with Joan Muzzillo and then gave her Exhibit 31, and conducted the investigation we talked about, correct?

A. Exactly.

Q. Okay. Do you know whether Mr. Brown had a conversation with Mr. Thompson after the complaint you made in — after the conversation with him on June 27, 1996?

A. When he asked me, where he asked me can he have some pussy, he said — when he laughed it off, he said, Bob Brown would have a heart attack, he would have another heart attack if he found me anywhere near you. He just was laughing it off. So that made me think that he didn't — maybe he said something, but I don't know if he said anything that was harsh enough to make him evidently he didn't say anything that was harsh enough to make him stay away from me a couple days later.

Q. Do you know whether or not Mr. Brown had any conversations with Mr. Thompson after you had the meeting with Mr. Brown on June 27? Do you know whether or not they had a meeting about your complaints?

A. No, I don't know.

Q. On page 2 it talks about the write-up: I disputed it, and he would give threats that I would be written up again. Do you see that, very top of page 2, first full sentence?

A. Yes.

Q. I think you indicate here on a couple occasions that Mr. Thompson had made threats to you, on a couple of occasions, about writing you up?

A. And, yeah, or putting me on another shift or something.

Q. Had he ever written you up?

A. No, never gave me a —

Q. The write-ups were by your other supervisors?

MR. STEELE: Objection. It's a mischaracterization. She's testified only to one write-up.

Q. I'm sorry. As far as you know, you only had one write-up while you were employed by Marriott?

A. Exactly.

Q. That was not done by Mr. —

A. Well —

Q. That was Mr. Galloway, right?

A. Well, yeah, that was in the — I'm trying to in the beginning I think I did have one, but I'm trying to think. Mr. Blagmon — I'm trying to remember now. I don't remember that one being held over my head like this one. So I think it was when I — one was by Leroy Blagmon in the beginning, but it was for snow days, or something, that — I don't remember that fully, that one really fully. But I think that —

Q. Okay.

A. I don't remember that time, but I don't think they could have been too close apart, or —

Q. So there might have been two write-ups, one definitely by Mr. Galloway and one possibly by Mr. Blagmon, regarding missing time because of snow?

A. Exactly.

Q. Mr. Thompson never gave you any written write-ups?

A. No.

Q. Did Mr. Thompson ever change your shift? I think you said he was going to transfer you to the midnight shift.

A. He was going to transfer me to midnight shift.

Q. Did he ever transfer you to midnight shift?

A. He didn't get a chance to.

Q. Did Mr. Thompson carry through on any other threats he may have made against you in connection with adverse employment action?

A. No, not that I can recall at this time.

Q. With regard to making promotion decisions in the security department, is that the job of the director of security?

A. To do what?

Q. Make promotion decisions.

A. I think the final would have to go through, if I'm not — to my knowledge, I think the final decision had to go through the director.

Q. When Mr. Thompson on occasion would make comments to you about wanting to have sex and comments, was he joking or was he serious?

A. Some of both. I think he was serious with all of them. I felt he was serious with all of them. But the manner, he did some of them in the manner of joking and some in the manner with serious.

Q. But I mean, did you get the impression that he actually did want to have sex with you and, if you had consented, he would have?

A. Yes.

Q. You discussed this incident on page 2 where he had a stick in the security office that he hit you with?

A. Yes.

Q. And then you have (lightly though). Can you explain what that was about?

A. This was one of his joking times. Toward the end of the night, when we, like, everybody — we have to shut down the building. Most all the officers come down and get everything they need for shutting down or getting ready to punch out. And all the officers there, it's like he's showing off.

He would be like, I'm going to give you a course in Charlotte 101. And, you know, this is Women 101, you know. Like, one of the younger officer that we have, Chris Carlini, he would be like, you know — you know, if I would say something, he was like, We didn't tell you to

speak yet, you know, and had the stick. You know, it was like, You can't speak yet, you know. And then he was like, This is you all's course in Charlotte 101, or Women 101, and he would do that.

And then he would take a big chair that we had in front of the break room and push it out to where everybody was and sit down. And once he would go to get a chair, I knew what he was doing, and usually I would get away. But after they did it so many times, when I would run, somebody would catch me and hold me until they got the chair there. And they would push me over his lap while he hit me with the stick.

Q. Is that the incident where you refer to him as spanking you?

A. Yes, he was spanking me, saying — used to call me a RAB, and he used to say —

Q. RAB?

A. Rotten-ass brat. That's what it meant. And he kept on calling me that until then anybody knew that's what it was. And he would always go around, going, Ha, ha, ha, Charlotte never had a beating, the only beating Charlotte ever had, she had, you know, such and such many, and I'm the one that gave them to her, and stuff like that. So he would go around, you know, funning with the guys about this, you know. And this was a supervisor.

Q. So these incidents you're talking about in your letter, I trust the bulk of them took place during the period from April 5, 1995 through the end of that year when he was your supervisor and was conducting these briefings?

A. Yes. When he became a supervisor, he got more gung-ho with it. It's like he had more confidence that —

Q. I'm sorry.

A. He just had more confidence that he could do what he wanted to because he was going to be supported.

Q. And you indicate that — I believe you testified that sometime in late '95 or early '96 he went to the day shift, and Mr. Galloway became your supervisor again, right?

A. Exactly.

Q. And I get from the gist of your statement that at that time, because you were on different shifts and he wasn't your direct supervisor, the incidents of harassment dropped off dramatically?

A. Right, until he got — yeah, until he got me by myself.

Q. And I believe you indicated while he was acting as the acting director for that three-week period after Mr. Brown had the heart attack, he worked well with anyone, he would talk to me about things but nothing sexual?

A. Exactly.

Q. So during the time he held that position as the acting director, did he not engage in anything which you thought was inappropriate?

A. No, because he worked days, so he was — we never got an opportunity to be by ourselves. You know, he was more busy, and I worked evening shifts, so — and then he wanted as much support. He wanted as much support as he could. I think he was just so overwhelmed that he didn't even think about anything else, just this power position.

Q. So it looks like, after he went from day shift in late '95, early '96, the incidents of sexual harassment toward you involved statements that I would like to mess that up, referring to your hair; the statement we talked about where he said to you, We're going to fuck, aren't we; and the incident in June '95, in the parking lot, in which he asked you, he asked if he could give you some head, correct?

A. What was the question again?

Q. The question was — let me preface it. In looking at this, we have a whole bunch of instances of conduct Mr. Thompson did towards you while he was a supervisor, while he was your direct supervisor. A lot of them we haven't even talked about yet. Then, after he went on days in late '95, early '96, you indicated that since you were on different shifts, his harassment towards you dropped off dramatically.

A. Right, unless he got me by himself. Every opportunity we had by ourself, he would utilize it.

Q. Now, the instances after he began working the day shift in late '95, '96, that you indicate were sexual harassment, involved the statement that he made that we're going to fuck, aren't we; statements about I'm going mess that up, referring to your hair; and the statement in the parking lot on June 15,

1996, in which he asked if he could give me head; and the incident on the 23rd of July in which he stated to you I want some pussy.

A. You're saying are these the only things he ever did to me?

Q. Well, no, no, no. I'm not saying the only things he did to you, I'm saying after he stopped becoming your supervisor of your shift —

A. Oh, okay.

Q. — those are the things he did to you?

A. Most of them were witnessed, those are most of the things that had witnesses, but that wasn't everything, the ones that were by ourself. I tried to stick with most of the things that I have witnesses for.

Q. Okay. Focusing on the time after he went on the day shift in late '95, early '96, other than what's mentioned in here, what other things did he do to you that were sexually harassing, that we haven't talked about?

A. He would sometimes come back on property. This was things he did before, and when he had the time, he would come back on property. I had to do — and wherever I was by myself, he would check and see what's going on. He would try to either, you know, go up my skirt or grab me, or try to kiss me, or something like that.

Q. So, I mean, there were occasions where he actually touched you and grabbed you before and after he was directly supervising you?

A. Exactly.

Q. How many times did he spank you with that stick?

A. I can't recall. It was another one of his ongoing jokes.

Q. You had a meeting with Mr. Biemeck on November 22, 1995, in which you brought to his attention concerns about Mr. Thompson. Do you recall that? I'm on page 3 of your statement.

A. Okay.

Q. It starts with For a person.

A. Exactly. I remember that.

Q. What were the concerns you brought to the attention of Mr. Biemeck on November 22, 1995 regarding Mr. Thompson?

A. I brought to his attention

Q. Were these concerns about not getting — concerns about the attendance issues and the write-up?

A. Well, initially the concerns was for everything, but I didn't know Leo was going to be present, so I didn't bring up anything —

Q. You didn't bring up any sexual harassment?

A. Or about Leo, because he was present. But I didn't want to come looking like — you know, I had other issues, so I just stuck to the ones that —

Q. Okay. So you had this meeting with Mr. Biemeck on November 22, 1995 where Mr. Thompson was present, correct?

A. Exactly.

Q. And during this meeting with Mr. Biemeck — and Mr. Biemeck is the general manager of the facility, or was at the time?

A. Used to be.

Q. During this meeting, you brought up concerns you had with Mr. Thompson but did not mention anything about sex harassment, correct?

A. Exactly.

Q. And the reason you didn't bring anything up about sex harassment is because Mr. Thompson was present?

A. Yes.

Q. Why didn't you bring complaints about sex harassment to Mr. Biemeck through another time, through another avenue?

A. Because that incident right there made me not it was another reason not to feel comfortable. I make a meeting and he brings someone that I don't need in it. So that right there made me not trust that. You know, hopeless.

Q. In this meeting Mr. Biemeck told you that, after your write-up cleared a year later, he would make sure you get promoted to the Officer II position, right?

A. Exactly.

Q. And in fact, once your write-up was cleared in 1996, you were in fact promoted, right?

A. Yes.

Q. Okay. Now, had you asked the director if you could go on the day shift?

A. Yes.

Q. Do you know who was selected to go on the day shift?

A. One time it was Nacgill Clottey. They said he had seniority, so he was the next to go.

Q. Was that true?

A. Yeah. He was a month before me. And then the second time they brought in someone from off site somewhere and put them in the position.

Q. Now, you indicated an occasion in early 1996 — and I'm on page 4 of your statement. You indicate an occasion in early 1996 in which Mr. Crabtree told you that your personnel file was thick, which led you to believe that Mr. Thompson had showed your personnel file to him, so you went to Mr. Gamble and complained, correct?

A. In passing, I talked to him.

Q. You went to Or. Gamble and complained that Mr. Thompson had shown your personnel file to another employee, right?

A. Yes.

Q. And as a result, Mr. Gamble contacted Mr. Thompson about that, right?

A. Exactly.

Q. Did he inform him that it was inappropriate to do that?

A. I don't know what he informed him. I just know — I don't know what he informed him.

Q. Do you know what Mr. Gamble did or said to Mr. Thompson after you brought this complaint to his attention?

A. No.

Q. Why did you not mention any allegation of sexual harassment at this time to Mr. Gamble when you were bringing a complaint to him about Mr. Thompson, in any event?

A. Because I was talking. I didn't even sit when I went to his office. I passed his office and yelled in to him. I don't think yelling sexual harassment is appropriate, but it didn't matter to say, My files are out. I didn't mind saying that in public, but I didn't feel comfortable yelling sexual harassment through to the hallway.

Q. Why didn't you go in his office? Obviously he — strike that. He listened to your complaint and contacted Mr. Thompson about the file incident. Why didn't you use that occasion to talk to him about sexual harassment at the same time?

A. He was trying to get me out of there at that time anyway, so I had to get my, what I had to say — I just yelled what I had to say. And since it was short, I just blurted it out. Because I knew he wasn't going to give me the time to talk to him. He never did.

Q. Could you relay for me the instances of sexual harassment you reported to Ms. Muzzillo that Mr. Thompson subjected you to, that are not reflected in your August 8 statement?

A. The fact that he would sneak behind me and try to force his hands up my skirt, the fact —

Q. How many times did he do that?

A. He would just sneak up. He did it a couple of times. I don't remember. He did it a couple of times.

Q. How far up your skirt would he go before he stopped?

A. As quick as he could move. Sometimes he reached further. My back would be toward — I could be working on the computer. He plotted everything he did. So he was like behind — he was like all ready, so he would, like, sneak up. Sometimes I didn't even know he was even in my area, you know, close to me, that close to me, before I knew he was up my skirt.

Q. Are you talking about when you were sitting down, he put his hand up your skirt?

A. Like behind me, he would sneak and he would be in like a prowling position. And the next thing you know, he'll just quickly. He would creep, so, you know, I'm typing, or whatever, and he would just sneak, and anybody — he would run his hand up my leg as fast as he could, see how far he could get each time, you know.

Q. Did he ever touch your genitals before you stopped him any time he did this?

A. No, my underwear. That's one of the scuffles that I encountered with him.

Q. We're going through instances in which Mr. Thompson sexually harassed you that are not identified on this, that are not identified in the statement. You indicated he put his hands up your skirt on a couple of occasions.

A. Yes.

Q. Any other instances?

A. He would be making comments when he did it, stating he just — stating he just wanted the smell on his finger so he would have, you know, the smell of my vagina on his finger. He showed me his penis.

Q. Why didn't you put that in your statement?

MR. STEELE: Objection, asked and answered. You can go ahead, answer it again.

A. Because I wanted — I already had the hard to trust of the company anyway, and I wanted to focus on everything that I had witnesses for.

Q. Okay. Any other instance of sexual harassment that Mr. Thompson subjected you to that's not in this list, that's not in Exhibit 31?

A. He had mooned, pulled down his pants and showed his hind parts.

Q. Anything else?

A. Right now I can't recall all he was — I can't —

Q. How many times did he show you his penis?

A. It was more than once. After I caught on, I would know that — I didn't trust anything he would say. He would try to catch me in a trap to turn and look his way, you know. That is probably most of the time how he got to sneak up on me, because I'm so busy trying to avoid him.

Q. Would you say two or three times that he showed you his penis?

A. I don't know exactly sure. Could be that the ones, probably the couple of times that I've caught. I can't be precise about that.

Q. Do you remember the dates?

A. No, I don't.

Q. How many times did he moon you?

A. Maybe once or twice.

Q. Do you remember the dates?

A. No, I don't.

Q. Any other instances of sexual harassment that are not contained in your August 5 statement, by Mr. Thompson, that we haven't discussed?

A. You have to repeat that. Tearing makes me feel real awful. So, you know, crying just makes me congested more, so it's making me feel worse now, and you have to — so you can repeat it.

Q. Sure. The question is, were there any other instances of sexual harassing conduct by Mr. Thompson towards you that are not contained in Exhibit 31, other than the ones we just discussed?

A. To my knowledge right now, that's all I can just, you know, constant, you know, asking about — I mean, comments, you know, not unless, you know, more specific on comments.

Q. I mean, are there any comments he made to you of a sexual nature that are not contained and detailed in this Exhibit 31?

A. Yes.

Q. What comments?

A. He would just keep asking me for — well, he would continue asking me to perform oral sex. He would say his diabetes — you know, he said, he would beg me, he would practically beg, talking about, You don't have to worry about me having sex with you because my diabetes, you know, makes me not be able to get a hard-on, so you wouldn't have to worry about sex. All I can do is give you oral sex, and, you know, stuff like that. And he would keep pressuring, harassing me about doing that. That, you know, just saying, I don't want — you know, I don't want, you know, I don't want to have to have sex with you. You know, I don't have to have intercourse, I just, you know, would like to give you some oral sex. And he just keep harassing me about it over and over. And, you know, just would keep making comments on how he can't, you know, get an erection because of the diabetes.

Q. Any other comments you recall that are not contained in this Exhibit 31?

A. I'm quite sure there's more, but I can't — just try not to think about them. I can't think of all of them. There were so many.

Q. Can you recall any others right now?

A. Right now, I can't recall anymore.

MR. HORN: I guess this is a good time to break, since it's about one minute before the time I set. I guess we'll see you, Ms. Aheart, next Wednesday, and I'll see you on Monday. Okay.

(The deposition was recessed at 4:57 p.m.)

* * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLOTTE AHEART, Plaintiff	*	CIVIL ACTION No. PJM-97-3685
	*	Baltimore, Maryland
vs.		
	*	April 27, 1998
MARRIOTT MANAGEMENT SERVICES, INC., Defendant	*	

* * * * *

Deposition of LEO THOMPSON, a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Charlotte Aheart is the plaintiff, and Marriott Management Services, Inc., is the defendant, pending in the District Court of the United States for the District of Maryland, before Susan E. Smith, a Notary Public in and for Baltimore County, Maryland, at 2 Hopkins Plaza, Baltimore, Maryland 21201, at 9:07 a.m., April 27, 1998.

* * * * *

Reported by:
Susan E. Smith, CSR

enhance our benefit package.

MR. HORN: Can I have these marked as Exhibits 1 and 2?

(Thompson Deposition Exhibits 1 and 2 respectively were marked by the reporter.)

Q. Mr. Thompson, I'm showing what we've marked as Exhibits 1 and 2. Can you identify Exhibit 1?

A. Yes.

Q. What is this document?

A. That was from the director at that present time, Mr. Gamble, who I think was notifying the security department that I had just come on board.

Q. Did Mr. Gamble hire you?

A. Yes, I would say so, along with — well, only thing that I know, in the interview process, is Mr. Brown, Mr. Galloway, and Mr. Gamble, and that he was the actual one that said, you know, you have the job.

Q. Mr. Gamble?

A. Yes.

Q. Is this date of hire correct, May 23, 1994?

A. To my recollection, that is correct.

ORIGINAL

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

CHARLOTTE AHEART,	)	
Plaintiff,	)	
v.	)	Civil Action No.:
SODEXHO MARRIOTT SERVICES,	)	PJM-97-3685
INC.,	)	
Defendant.	)	

Washington, D.C.

Tuesday, May 12, 1998

Deposition of:

DONALD LORENZO GALLOWAY,

a witness, called for examination by counsel for Plaintiff, pursuant to notice, the witness being duly sworn by Jewel I. Davis, a Notary Public in and for the District of Columbia, held at the law offices of Eric Steele, 1119 Twelfth Street, N.W., Washington, D.C., commencing at 10:30 a.m., when were present on behalf of the respective parties:

A. Well, you see the correction there, I did not witness anything, so we signed off and corrected that. And basically that I knew when she told me about the CPR training situation, that incident, and that, you know, I advised her to contact Mr. Brown, whatever, which she did do. I didn't think this was right or fair that I receive a written warning.

Q. You didn't think it was right or fair because you knew Ms. Aheart had discussed the matter with Mr. Brown?

A. Yes. Because of the fact she came to me as a confidential personal matter and I told her she had to tell Mr. Brown, which she did do in the time allotted. And also due to the fact that I was supposed to be transferred, anyway, before this happened — before this date and I wasn't and so I didn't think it was right and fair.

Q. When you said you were supposed to be transferred before this date, what do you mean?

A. Well, I had already been offered a job — my new position.

Q. The computer position you were referring to earlier?

A. Right. And I stayed with security for four weeks instead of the normal two because Mr. Thompson had been removed at that time, so I stayed to help out. So I didn't think that was right or fair I receive this.

Q. You didn't think it was fair because you decided to help out the security department when you could have left and gone on to the position that you had already applied —

A. Right. And also the fact, like I said, she did tell Mr. Brown. I didn't tell him specifically, but — So by letter of this rule, yes, I would be written up, but by — They needed a scapegoat.

Q. And you thought you were a scapegoat?

A. Yes.

Q. When you approached Mr. Brown and said, Mr. Brown, didn't Ms. Aheart approach you about this matter, and if she did, why am I getting written up. Was that the substance of what you told Mr. Brown?

A. Yes.

Q. What was Mr. Brown's response to those comments?

A. Said I could have been fired.

Q. Did he say anything else to your comments that

Q. When was the first time you saw this document?

A. It looks like I wrote the document in October of '94.

Q. Is that your signature above the 10-20, I believe, '94 date?

A. It looks like it.

Q. Why did you write this document?

A. Well, as the documents states, I was approached by Thompson and Aheart about inappropriate touching and physical contact between the two of them in October.

Q. If I'm reading your memo correctly, Aheart Thompson of inappropriate touching and Thompson Aheart of inappropriate touching?

A. Yes.

Q. Did they both deny each other's accusations?

A. Yes.

Q. Why did you prepare this memo following your discussions with Mr. Thompson and Ms. Aheart?

A. Well, I gave it to my manager, John Gamble.

Q. To whom?

A. I kept it in my file and gave him a copy.

Q. Did you have a discussion with Mr. Gamble about it?

A. Yes.

Q. And what was the discussion with Mr. Gamble?

A. I don't recall.

Q. Did Mr. Gamble tell you to do anything else?

A. Because I didn't — I don't recall, but I followed his directives.

Q. I'm not sure I follow you. Are you saying as a general matter you followed his directives —

A. Yes.

Q. — or are you saying specifically here you don't recall what he told you to do, but you did what he told you to do?

A. Right. Yes, I don't recall what he told me to do, but if told me to do something else, I would have done it.

Q. But you don't recall what, if anything — He could have told you nothing?

A. Well, we discussed it.

Q. I understand that. But you could have had a discussion with him and he did not give you a directive or you could have had a discussion with him and he did give you a directive, but at this time today, you don't recall?

A. I don't recall, right.

Q. Did you ever have any discussion with anyone else regarding this October 20th, 1994 memo or the contents therein, prior to the things that dumped off in August of 1996?

A. Yes.

Q. Who else?

A. Leo Thompson.

Q. When did you have a discussion with Leo Thompson?

A. Sometime after he was elevated to the position when Bob was out, he went through the personnel files and pulled this out.

Q. Whose personnel file was this in?

A. I'm not sure.

Q. When you say he went through the personnel files, are we talking about personnel files of the security employees?

A. Yes.

Q. You gave this memo — You indicated a moment ago you gave this memo to Mr. Gamble, correct?

A. Yes.

Q. What else, if anything, did you do with this memorandum?

A. I had — Let's see, I had working files — I don't recall. I don't recall. I don't recall.

Q. Let me ask you this: Did you insert this memorandum in anyone's employee jacket or employee file?

A. Well, Mr. Gamble had — Mr. Gamble, Mr. Thompson, and Mr. Brown had employee jackets.

Q. Are you saying as a supervisor you didn't have access to the employee files?

A. Not the permanent files, no.

Q. When you say the permanent files, what do you mean?

A. Well, like if someone is late you might have copies of their lateness or minor matters or whatever you kept locked up, or something. But this sensitive I wouldn't keep — although it was locked, I wouldn't keep it in my file cabinet?

Q. I'm sorry, did you say your file cabinet was not locked, or did you say —

A. It was locked.

Q. You wouldn't keep it in your file cabinet because it was locked?

A. I would not.

Q. You would not?

A. Not nothing like this, no.

Q. Where did you keep your copy of this document or did you keep a copy of this document?

A. I don't think I kept a copy. I don't recall keeping a copy.

Q. So if it made its way into an employee file, Mr. Gamble did that?

A. Yes.

MR. HORN: Object to the form of the question.

BY MR. STEELE:

Q. If it made its way into the employee file, you didn't do it?

A. Yes.

Q. And after you gave Mr. Gamble his copy, you didn't have a copy any more?

A. I don't recall, no.

Q. And you didn't print out — Did you keep this on your computer?

A. No.

Q. Other than Mr. Gamble and other than — Well, what was the discussion between you and Mr. Thompson

ORIGINAL

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

CHARLOTTE AHEART,	)	
Plaintiff,	)	
v.	)	Civil Action No.:
SODEXHO MARRIOTT SERVICES, INC.,	)	PJM-97-3685
Defendant.	)	

Washington, D.C.

Thursday, May 7, 1998

Deposition of:

ROBERT H. BROWN,

a witness, called for examination by counsel for Plaintiff, pursuant to notice, the witness being duly sworn by Jewel I. Davis, a Notary Public in and for the District of Columbia, held at the law offices of Eric Steele, 1119 Twelfth Street, N.W., Washington, D.C., commencing at 2:25 p.m., when were present on behalf of the respective parties:

supervisor under Mr. Gamble; is that correct?

A. Yes.

Q. Do you ever recall Mr. Leo Thompson attending any of those seminars with you?

A. I can't say positively.

MR. STEELE: Mark this please?

(Brown Exhibit No. 8 was marked for identification.)

BY MR. STEELE:

Q. Mr. Brown, could you tell us what this is?

A. It's a note that I made in my Day Planner on June 27th, 1996 at approximately 2:30 in the afternoon.

Q. You made the note at 2:30, or does the 2:30 refer to when the matter that's referred to in the note occurred?

A. The time refers to the time I made the note after the meeting.

Q. What does this note refer?

A. It refers to the time that Charlotte came to my office, we had a prearranged time, she had requested to meet with me and wanted to discuss a matter with me of a confidential nature. And she came into my office and sat down. And I asked her what the problem was and then she said, well, first of all she was — she was -she was embarrassed to be there, she said, but she needed to talk to me because something had to be done and that she was being harassed by — harassed by Leo Thompson, and that she wanted it handled within the unit and she wanted it to remain confidential with me. And there was no specifics, there was no mention of any specific sexual harassment, just that he was bothering her and that she didn't like it.

And I said, well, Charlotte, I said you got to — you are going to have to let him know that you don't like whatever it is he is doing, you have got to tell him. And I said, you are going to have to go back to him and tell him to stop whatever it is that he's doing and I said you also tell him that you went to the director. I said you can tell him that you asked me to keep it confidential. I said if the behavior continues, you have got to come back to me and we will take it to the next step.

Probably maybe 15 or 20 minutes was the total time that we spoke with this. She indicated that she

MARRIOTT MANAGEMENT SERVICES MEMORANDUM

TO: Security FROM: John Gamble

COPIES: DATE: April 5, 1995

Supervisors
Leo Thompson
Candidates
Staff

SUBJECT: Supervisor Promotion

I am pleased to announce, effective Monday, April 10,1995, the promotion of Security officer Leo Thompson to the position of Evening Shift supervisor.

Leo bungs to this position, a wealth of knowledge, a high level of maturity and security experience. Our department staff is looking forward to working with Leo and assisting him in his career development; and the continuing improvement of the Evening and Midnight shifts effectiveness as a combined security team.

This decision was difficult in that our department is fortunate to have multiple qualified candidates for this position. Ply congratulations for a job well done goes to those that were not selected for this position at this time.

Please recognize and offer your support to Leo and the other candidates. Hopefully, future opportunities will become available for those candidates and others that recognizes the importance of quality performance, continuing education and initiative.

8-14-96

I Leroy Blagrow make this statement voluntarily And without coercion or promise of any material or monetary award,

Reference the meeting with Joan McGill on August 14th, 1995. Question have you ever witness Leo Thompson Touching or Verbal Sexual harrassing Charlotte Ahern. I have witness Leo Thompson saying to Ahern ~~You~~ are going to fuck me huh. my comment was to Charlotte " you better not assume things" Then I said come with me. I never witness Leo Touching Ahern.

Leroy Blagrow

Leroy Blagrow

BEST AVAILABLE COPY

Memorandum

To: *Donald Galloway*
From: *Robert Brown*
Date: *08/22/96*
Subject: *Conduct as a Supervisor*

During a recent investigation of sexual harassment charges, you admitted you knew ~~and witnesses~~ the sexual harassment an associate reported she had been subjected to. As you know Marriott International has a specific policy which prohibits sexual harassment. The policy in part states:

> **". . . physical or verbal conduct tat creates a sexually offensive work place, whether committed by associates (management or non-management) vendors, guests or customers is also prohibits."**

Sexual harassment of any nature toward any associate is **unacceptable** and violates not only Marriott's policy against sexual harassment but also federal law. In addition, the law requires that managers and supervisors must take immediate corrective action to a complaint of sexual harassment. Donald, your lack of responsiveness as a supervisor to the associate's complaint placed yourself and Marriott at Meat risk. Therefore, you are receiving this written warning. Donald in the future you must take the appropriate action and notify your management and human resources promptly.

Associate Signature — 8-26-96 Date

Manager's Signature — 8-26-96 Date

Witness Signature — 08/26/96 Date

Memorandum

To: *Leroy Blagrnon*
From: *Robert Brown*
Date: *08'22'96*
Subject: *Conduct as a Supervisor*

During a recent investigation of sexual harassment charges, you admitted you knew and witnessed the sexual harassment an associate reported she had been subjected to. As you know Marriott International has a specific policy which prohibits sexual harassment. The policy in part states:

> **". . . physical or verbal conduct that creates a sexually offensive work place, whether committed by associates (management or nonmanagement) vendors, guests or customers is also prohibited."**

Sexual harassment of any nature toward any associate is **unacceptable** and violates not only Marriott's policy against sexual harassment but also federal law. In addition, the law requires that managers and supervisors must take immediate corrective action to a complaint of sexual harassment. Leroy, your lack of responsiveness as a supervisor to the associate's complaint and what you personally witnessed, placed yourself and Marriott at great risk.

Therefore, you are receiving this written warning for not properly handling the sexual harassment complaint of an associate in the work place that you personally as a supervisor were aware of. Leroy in the future you must take the appropriate action and notify your management and human resources promptly. It is also expected that you will attend sexual harassment training within the next three months.

Leroy Blagrnon — Associate Signature — 8-26-96 — Date
Robert H. Brown — Manager's Signature — 8-26-96 — Date
[signature] — Witness Signature — 08/26/96 — Date

Memorandum

To: *Leo Thompson*
From: *Robert Brown, Director of Security*
Date: *8/21/96*
Subject: *Termination*

During your employment at the Headquarters account, an associate reported that she had been sexually harassed by you on more than one occasion between October 1994 to August 1996. You have denied the some of the reported allegations and affirmed others. Human Resources conducted a thorough investigation. The results of the investigation concluded that evidence and witness testimony substantiated the allegations made against you.

As you know, Marriott International has a specific policy which prohibits sexual harassment. The policy, in part, states:

> **". . . physical or verbal conduct that creates a sexually offensive work place, whether committed by associates (management or nonmanagement) vendors, guests or customers is also prohibited. Sexual harassment at work by any associate will result in disciplinary action up to dismissal, and may lead to personal legal and financial liability."**

Leo, you must understand that sexual harassment of any nature toward any associate, customer or vendor is **unacceptable** and violates not only Marriott's policy against sexual harassment but also federal law. In addition, you placed yourself and Marriott at great risk.

Leo your behavior in the work place and conduct as a supervisor in the Security Department has been inappropriate and unacceptable and results in your immediate termination of employment with Marriott.

Associate's Name/Signature: Robert H. Brown	Date: 8-26-96
Manager's Name/Signature: [signature]	Date: 08/26/96
Witness Name/Signature: [signature]	Date

MR. THOMPSON DID NOT WANT TO SIGN UNTIL HE SPEAKS WITH HIS ATTORNEY RHB

(2)

No. 00-365

Supreme Court, U.S.
FILED
OCT 05 2000
CLERK

IN THE

Supreme Court of the United States

CHARLOTTE AHEART,

Petitioner,

v.

SODEXHO MARRIOTT SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

TODD J. HORN
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2 cpp

QUESTION PRESENTED

Whether the district court and the court of appeals properly entered summary judgment against Petitioner Charlotte Aheart's Title VII sexual harassment claim because her employer, Respondent Sodexho Marriott Services, Inc., satisfied the affirmative defense articulated by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) where it is undisputed that:

- Respondent exercised reasonable care to prevent and promptly correct harassing behavior by distributing to its employees (including Petitioner) a comprehensive anti-sexual harassment policy and by conducting a prompt and thorough investigation that resulted in the termination of the harasser (Leo Thompson) once Petitioner complained to human resources.

- Petitioner unreasonably failed to invoke Respondent's sexual harassment policy since she did not report Thompson's harassment for well over a year after he became a supervisor and began to harass her.

CORPORATE DISCLOSURE STATEMENT

Respondent Sodexho Marriott Services, Inc. is a publicly held company and does not have any parent corporations. Sodexho Alliance, S.A., is a publicly held company that owns 10% or more of the stock of Respondent.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
A. The Proceedings Below	1
B. Statement Of Facts	4
Reasons for Denying the Writ	7
A. The Petitioner Asks The Court To Make Factual Findings Regarding The Applicability Of The *Faragher/Ellerth* Affirmative Defense.	7
B. The Rulings Of The Lower Courts In This Case Fully Comply With This Court's Holdings In *Faragher* And *Ellerth*.	13
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Bishop v. Nat'l Railroad Passenger Corp., 66 F. Supp.2d 650 (E.D. Pa. 1999) 11

Bouton v. BMW of North America, Inc., 29 F.3d 103 (3d Cir. 1994) 13

Brown v. Perry, 184 F.3d 388 (4th Cir. 1999) 12

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998) ..... *passim*

Dennis v. County of Fairfax, 55 F.3d 151 (4th Cir. 1995) 12

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998) ..... *passim*

Garrison v. Burke, 165 F.3d 565 (7th Cir. 1999) .. 13

Madray v. Publix Supermarkets, Inc., 208 F.3d 1290 (11th Cir.), *pet. for cert. filed*, 69 U.S.L.W. 3087 (July 12, 2000) 13

Scrivner v. Socorro Ind. School Dist., 169 F.3d 969 (5th Cir. 1999) 13

Torres v. Pisano, 116 F.3d 625 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997) 11

Statute:

42 U.S.C. § 2000e *et seq.* 1

STATEMENT OF THE CASE

The Petitioner does not challenge the legal framework that resulted in the entry of summary judgment against her sexual harassment claim, nor does she contend that the Court should review this case in order to resolve a split among the lower courts. Instead, she wants the Court to delve into the facts and apply them to the *Faragher/Ellerth* affirmative defense. The Court should decline her invitation to review this "fact-bound" determination.

A. The Proceedings Below

Petitioner Charlotte Aheart worked for Respondent Sodexho Marriott Services, Inc. (herein "the Company") as a security guard. In July 1996, Petitioner reported to the Company's human resources department that she had been sexually harassed by Leo Thompson, a low-level supervisor. The Company immediately investigated her allegations, found some to be substantiated, and terminated Thompson. Even though the Company promptly discharged Thompson for his misconduct, Petitioner filed this lawsuit alleging that the Company was liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

The Honorable Peter J. Messitte of the United States District Court for the District of Maryland ruled that the Company was absolved from liability under Title VII because, based on Petitioner's own deposition testimony, it fulfilled the affirmative defense articulated by this Court in *Faragher* and *Ellerth*. A panel of the United States Court of Appeals for the Fourth Circuit unanimously affirmed in an unpublished *per curiam* opinion, and the Fourth Circuit declined *en banc* review of that decision. This Petition followed.

Because the Equal Employment Opportunity Commission, the District Court and the Fourth Circuit all rejected her sexual harassment claim, the Petitioner resorts to a distortion of the record in her instant Petition. Her most pervasive gimmick is to contradict her sworn deposition testimony. Most notable in this respect is Petitioner's assertion that she "repeatedly" complained to her supervisors about Thompson harassment from May 1995 to June 1996. Pet., pp. 3, 12. This directly contradicts her deposition testimony that, after Thompson became a supervisor in April 1995, she did not complain about him until June 1996. *See* Joint Appendix in the Fourth Circuit (herein "JA") at 108-12. In fact, based on that testimony, Petitioner's attorney declared at the summary judgment hearing:

> THE COURT: [W]hat happened in October of '94? Is that the meeting where [Donald Galloway] put them apart?
>
> MR. STEELE: Allegedly, yes.
>
> THE COURT: She didn't do anything beyond that. When did she complain again?
>
> MR. STEELE: June of '96.

Id. at 545.

Petitioner's transparent attempt to grab this Court's attention with patently erroneous "facts" punctuates the infirmity of her Petition. The lower courts correctly found that the Company satisfied the first prong of the affirmative

defense — that it exercised reasonable care to prevent and promptly correct harassing behavior — because it distributed to Petitioner its comprehensive policy prohibiting sexual harassment, and when Petitioner reported Thompson to human resources, it investigated her allegations and terminated him.

The lower courts also correctly ruled that the Company satisfied the second prong of the affirmative defense because Petitioner "unreasonably failed to take advantage" of the Company's harassment policy and failed "to avoid harm otherwise" because she failed to report Thompson during the fourteen month period he harassed her while a supervisor. The facts that amplified Petitioner's unreasonable failure to complain for more than a year included her awareness that the Company prohibits sexual harassment and encourages complaints, and her admission that she knew Thompson's actions violated this policy. Petitioner's inexcusable delay in reporting Thompson sooner is underscored by her admission that, before Thompson ever harassed her, she reported to human resources that a co-worker had sexually harassed her which resulted in an immediate investigation and cessation of the harassment. Moreover, Petitioner saw human resources personnel "every day" and regularly complained to management and human resources about the way Thompson handled personnel matters, but she never reported that he was sexually harassing her.

Trying to divert attention from her unreasonable delay in reporting Thompson, Petitioner postulated that the Company should have terminated Thompson in late June 1996 (fourteen months after he began to harass her), when she told two first level supervisors and the director of security that Thompson had harassed her. She conveniently

omits that she asked these supervisors to keep her complaint confidential. They honored Petitioner's request for confidentiality, but the director of security instructed Petitioner to tell Thompson that she has complained and that if Thompson engaged in any further inappropriate conduct, he will take action against him. About a month later, Thompson made an untoward comment to Petitioner, and she lodged a non-confidential complaint to human resources. This resulted in Thompson's termination.

Against this backdrop the district court cogently observed "I think this woman could have stopped the harassment a long time ago, and she didn't." *See* JA at 555. The district court ruled that it was unreasonable for Petitioner not to complain for more than a year, as punctuated by the fact that the Company terminated Thompson promptly after she made her non-confidential complaint to human resources in July 1996. *Id.* at 551-54.

B. Statement Of Facts

In this Title VII case, Petitioner alleges that Leo Thompson sexually harassed her once in October 1994 (when he was a co-worker) and then after he became a supervisor in April 1995. Petitioner concedes, as she must, that when she finally reported Thompson to the Company's human resources department, he was fired. Pet., p. 5.

Petitioner specifically claims that in October 1994, she reported to Donald Galloway, a shift supervisor, that Thompson (then a non-supervisory co-worker) had grabbed her breasts. Petitioner erroneously asserts that Galloway did not take "any steps" in response to her

complaint. Pet., pp. 3-4. Petitioner's assertion that the Company ignored her complaint is belied by her testimony:

> Q. During this meeting, did Mr. Galloway indicate whether or not he was going to take any action against Mr. Thompson, notwithstanding your statement that you didn't want anything done to him?
>
> A. He didn't state it, but he took action.
>
> Q. What action did Mr. Galloway take against Mr. Thompson?
>
> A. Well, he kept us apart. That's the action he took. It wasn't against — I don't know if he did anything, or if he gave counseling, or whatever. I don't know, as far as that part. But I know that the action that he took was, you know, on my behalf, that, you know, something had to be done for it to be stopped. And I told him I wanted something to be done, and he made sure we weren't together, you know, didn't work the post together like we were when this happened.
>
> Q. Did he meet with you pretty quick after you complained to him about this incident?
>
> A. Yes.

See JA at 92-93. Galloway's response to Petitioner's report was effective since she admitted at her deposition that there were no further incidents or complaints over the next six months Galloway supervised her. *Id.* at 95-96.

In April 1995, Thompson was promoted to shift supervisor. Petitioner asserts that after this promotion, Thompson subjected her to a litany of sexually offensive remarks and touchings until July 1996, over a year later, when she reported him to human resources and he was discharged.

Prior to June 1996, however, Petitioner never reported Thompson's actions to any supervisor or to anyone in human resources. She also admitted that no one in a supervisory capacity ever witnessed Thompson sexually harass her during this period. The only incident ever witnessed by a supervisor occurred in late June 1996 (shortly before Thompson's discharge) when Thompson made a sexually inappropriate comment to Petitioner in front of Leroy Blagmon, a shift supervisor. Blagmon removed Petitioner from the situation and told her that he was going to report the matter to Robert Brown, the director of security. Petitioner, however, asked him to keep the matter confidential, which he did. *See* JA at 100-03, 261-62.

A few days later, Petitioner told Galloway that Thompson made an inappropriate remark to her, but asked that he keep it confidential. Galloway told Petitioner that if she did not report the matter to Brown, he would. Although Petitioner informed Brown that Thompson had harassed her, she annulled her complaint by insisting that he keep it confidential. Brown, however, told Petitioner that he would respect her request for confidentiality for the time being, but she must tell Thompson that she has reported the matter, that his conduct must stop, and that he cannot keep her complaint confidential if Thompson engaged in any further misconduct. Petitioner agreed to this. *See* JA at 108-09, 116-18.

For the next month Thompson did not engage in any inappropriate behavior. Then, on July 23, 1996, Thompson made an inappropriate sexual remark to Petitioner. The next week, Petitioner made a report to human resources without a request for confidentiality which resulted in an investigation and Thompson's termination. Petitioner admitted that the investigation which resulted in Thompson's termination was "prompt and thorough" and adequate in every respect. *See* JA at 78-86.

REASONS FOR DENYING THE WRIT

A. The Petitioner Asks The Court To Make Factual Findings Regarding The Applicability Of The *Faragher/Ellerth* Affirmative Defense.

This Petition does not raise any unresolved or conflicting legal principles in the context of Title VII sexual harassment litigation. Instead, the issue raised in this Petition requires an examination of the factual predicate regarding the Company's establishment of the *Faragher/Ellerth* affirmative defense. The lower courts determined that, based on Petitioner's own deposition testimony, the Company established that defense. In her Petition to this Court, the Petitioner merely argues that the district court and the Fourth Circuit "misapplied" the facts to the law. To support her "misapplication of the facts" theory, the Petitioner contradicts her sworn deposition testimony and glosses over inconvenient truths. In short, Petitioner would have this Court turn a blind eye to the admissions she made that establish the *Faragher/Ellerth* affirmative defense. Her Petition, accordingly, should be denied.

In *Faragher* and *Ellerth* this Court announced that, although an employer "is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor," in circumstances when "no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . ." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2292-93; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270. This affirmative defense has two components. An employer is not liable if it demonstrates that it "(a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293; *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270.[1]

The lower courts correctly held that the Company satisfied the first element of the affirmative defense because Petitioner admitted that she received the Company's comprehensive policy that prohibits sexual harassment and sets forth a complaint procedure which allows employees to go above the harassing employee. *See* JA at 36-38, 211. Petitioner does not and cannot challenge this.

Petitioner's testimony also established that the Company "promptly corrected" the behavior about which she complains. Over a year after Thompson became a supervisor and began to harass her, Petitioner finally complained to

1. This defense is not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* Petitioner does not contend that she was subjected to any such tangible employment action.

human resources, which immediately investigated her allegations, found them to be sufficiently substantiated, and fired Thompson. Petitioner admitted that the Company's response to her complaint was adequate in every respect. *See* JA at 85-86. Petitioner's suggestion that the Company did not take "any action" in response to her complaint is simply wrong. Pet., p. 11.

The lower courts also correctly concluded that the Company fulfilled the second element of the affirmative defense. By failing to report Thompson for well over a year, Petitioner "failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Faragher*, 524 U.S. at 805, 118 S. Ct. at 2292.

In this connection, Petitioner contends that Thompson began sexually harassing her shortly after he became her supervisor in April 1995. Petitioner, however, admitted that she did not complain to anyone in a supervisory capacity until late June 1996 — over a year after this harassment began — when she first made her confidential complaint. While she asserts in her Petition that she complained "repeatedly" from May 1995 to June 1996, Pet., p. 12, this contradicts her deposition testimony, as her lawyer readily acknowledged at the summary judgment hearing:

> THE COURT: [W]hat happened in October of '94? Is that the meeting where [Mr. Galloway] put them apart?
>
> MR. STEELE: Allegedly, yes.

THE COURT: She didn't do anything beyond that. When did she complain again?

MR. STEELE: June of '96.

See JA at 545.

A panoply of other undisputed facts demonstrated that Petitioner did not fulfill her duty to avoid or minimize damages since she failed to complain for so long. Petitioner *knew* from the outset that management and human resources were available to remedy harassment because, in 1993, she complained that another employee (Walter During) had sexually harassed her which resulted in an immediate investigation and cessation of the harassment. *See* JA at 66-68.

Petitioner testified that she saw Dolores Coe from the Company's human resources department "every day," but decided to keep Thompson's actions a secret. *See* JA at 69. Likewise, Petitioner had meetings with Joan Muzzillo in human resources and John Gamble, the head of security, to discuss attendance issues. Although Thompson supposedly was sexually harassing her at these times, she inexplicably did not report him during these meetings. *Id.* at 55-56, 60-61, 69-71.

Petitioner also complained repeatedly to Thompson's supervisors about the way Thompson handled various personnel matters, but she *never* reported any sexual harassment by Thompson even though *he* was the subject of the meetings. *See* JA at 124-28, 130-36. Petitioner also admitted that she *knew* the Company prohibited sexual

harassment and *knew* that she was being sexually harassed in violation of the Company's policy *at the time* Thompson engaged in the inappropriate conduct. *Id.* at 129.

Although Petitioner conceded that she did not make a non-confidential complaint about Thompson until late July 1996 and that he was fired as a result of her complaint, she asserts that the Company should have responded in late June when she made confidential complaints about Thompson to first level supervisors Blagmon and Galloway and to Brown. Petitioner clearly did not fulfill her duty "to avoid or minimize" harm when she complained to her supervisors about Thompson in one breath, but urged them to keep her complaint confidential in the next. *Faragher*, 524 U.S. at 806, 118 S. Ct. at 2292 (citation omitted). *See also Torres v. Pisano*, 116 F.3d 625 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997) ("[I]t must be said as a matter of law that [the supervisor] behaved reasonably in honoring [plaintiff's] request for confidentiality and in failing to act immediately to end the harassment."); *Bishop v. Nat'l Railroad Passenger Corp.*, 66 F. Supp.2d 650, 668 (E.D. Pa. 1999) (Second prong of affirmative defense met where "each other time that a Plaintiff complained to somebody . . . Plaintiff specifically requested that nobody else be told.")

Petitioner disingenuously suggests that the Company's decision to issue Galloway and Blagmon disciplinary warnings for their decisions to respect Petitioner's request for confidentiality concerning Thompson's actions warrants reversal. Pet., pp. 5-6, 14-15. Petitioner forgets that the written warnings do not negate her request for confidentiality, but evidence the Company's high standards for preventing workplace harassment that exceed what Title VII requires.

Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999) (holding that even though plaintiff reported the harassment to a supervisor, her failure to take his advice and "contact an EEO counselor" was not reasonable, even though the supervisor violated an employer directive that all sexual harassment, even those a victim does not want to pursue, must be reported to human resources); *Dennis v. County of Fairfax*, 55 F.3d 151, 154 (4th Cir. 1995) (rejecting plaintiff's argument that employer's "corrective action" following his internal complaint "amounts to a concession that discrimination actually took place" because to do so would encourage employers not to investigate complaints of discrimination).

Petitioner also erroneously asserts that Blagmon witnessed Thompson sexually harass her prior to June 1996 (when she made her confidential complaint), but took no action. Pet., pp. 4, 9. Petitioner again conveniently fails to acknowledge her testimony that she did not complain about this and that the "harassment" Blagmon supposedly witnessed was Thompson's remark that he wanted to "mess up" her hair and joking inquiry about whether he and Blagmon could double date Petitioner and her mother. *See* JA at 103-08. Although these remarks do not rise to the level of a Title VII violation, Petitioner forgets that she did not complain about these remarks and that Blagmon, as a first level supervisor, was not a "high-echelon official" whose knowledge was imputed to the Company in the absence of any complaint by Petitioner. *Faragher*, 524 U.S. at 789, 118 S. Ct. at 2284 (collecting "myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop.") (citations omitted).

B. The Rulings Of The Lower Courts In This Case Fully Comply With This Court's Holdings In *Faragher* And *Ellerth*.

Petitioner not only misstates the facts in this case, she misstates the lower courts' holdings in hopes of creating an issue worthy of writ consideration. Their rulings in no way jeopardize this Court's holdings in *Faragher* and *Ellerth*; the purported conflict raised by Petitioner does not exist, and review by this Court is unnecessary. Indeed, contrary to Petitioner's suggestion (Pet., pp. 15-18), the lower courts' unpublished decisions in this case are in total harmony with precedent from other courts of appeal. *Scrivner v. Socorro Ind. School Dist.*, 169 F.3d 969, 971 (5th Cir. 1999) (summary judgment affirmed where plaintiff did not report supervisory sexual harassment for over eight months, even though she had numerous audiences with human resources, and the supervisor was removed when she finally made a formal complaint); *Garrison v. Burke*, 165 F.3d 565, 571 (7th Cir. 1999) ("[E]ven if [supervisor's actions] *did* rise to the level of sexual harassment, [plaintiff] usually did not report to her superiors that she was uneasy about seeing [him]. The City authorities certainly cannot be held responsible for a failure to act, when [plaintiff] chose not to inform the City about her concerns.") (emphasis in original) (citation omitted); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) (No employer liability for sexual harassment where plaintiff had previously complained to members of human resources about personal and personnel problems, but "did not report any incidents that they considered to be sexual harassment.") (footnote omitted); *see also Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir.), *pet. for cert. filed*, 69 U.S.L.W. 3087 (July 12, 2000) (holding that the second prong of the

affirmative defense was satisfied where "plaintiffs failed to reasonably utilize the complaint procedure provided by the [employer's] open-door policy" because, even though they complained to mid-level managers, the policy requires that "if a problem is not resolved, the employee should go to the next highest level of management, to the top level if necessary," and when top management learned of the harassment, the harasser was discharged.)

Moreover, contrary to Petitioner's suggestion, the lower courts did not conclude that the Company failed to satisfy the affirmative defense. Pet., p. 13. By extracting portions of the district court's ruling out of context, Petitioner erroneously asserts that the district court found that her supervisors "failed to do their job" and that, accordingly, it "essentially" found that the Company could not establish the first prong of the affirmative defense. Pet., p. 13. Petitioner's manipulation of the record is revealing and ignores the fact that her supervisors were respecting her request for confidentiality. Petitioner also forgets that, shortly after she made these confidential complaints, she lodged a non-confidential complaint to human resources that resulted in Thompson's termination.

Petitioner concludes that the district court and the Fourth Circuit "thumbed their noses" at this Court by concocting an "Alice in Wonderland" decision Pet., p. 12. Notwithstanding Petitioner's characterization of the lower courts' actions, they properly held that Petitioner utterly failed to raise an issue of fact concerning her sexual harassment allegations. They ruled, purely and simply, that the *Faragher/Ellerth* affirmative defense was satisfied in this case. This is not, as Petitioner suggests, an aberration or travesty that will send sexual harassment law into a tailspin.

Rather, it resulted from the proper application of the affirmative defense based on a full and fair consideration of the facts as recited by Petitioner at her deposition. This case raises no significant issue of sexual harassment law that warrants this Court's review.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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